Vol. III—Atlas.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 4, Original.

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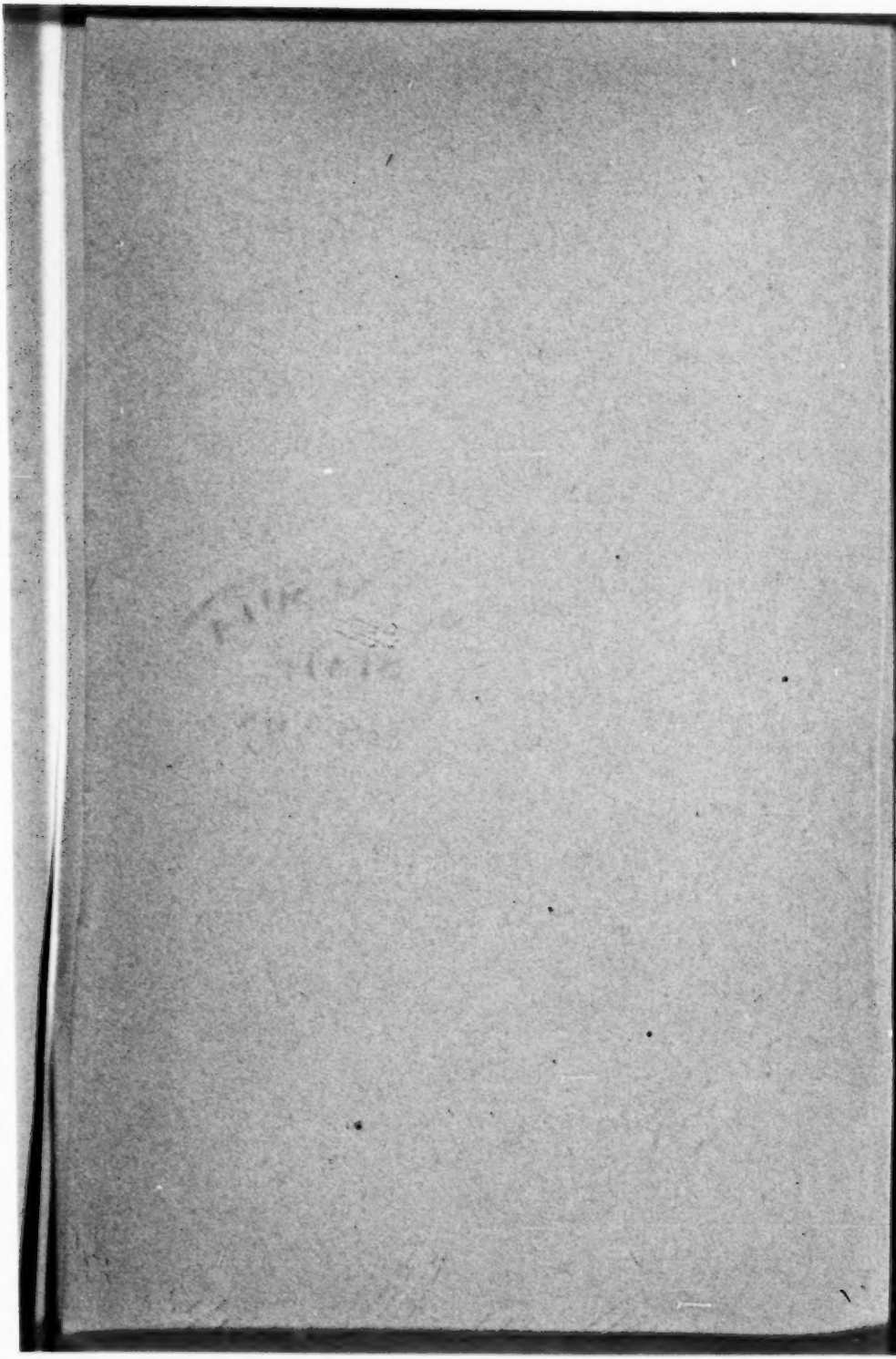
THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

IN EQUITY.

FILED MARCH 22, 1909.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 4, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

IN EQUITY.

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UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1913.

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NOT

SUITABLE

FOR

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 7, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

MOTION TO SET DOWN CASE FOR TRIAL AND TO FIX THE METHOD OF TRIAL.

Brief Statement for Complainant.

This is a motion on the part of the State of North Carolina to set down this case for trial, and to fix the method of trial and incidentally fix the time for taking and returning the evidence.

The bill in this case was filed in this court for the purpose of fixing, re-establishing, the boundary line between the State of North Carolina and the State of Tennessee.

Of course this is not an ordinary case of a dispute between private owners who may own a few rods of adjacent ground.

but involves very material and important interests.
object of this suit is to definitely settle these que
between two sovereign States. It is obvious from
sideration of the proceedings that sooner or later, s
before the final adjudication of the case, a survey
lands must be made by some properly constituted, i
authority, and the plaintiff submits that, in the eco
time and money, it is better to provide for these surv
so that this court may have the benefit of them when
to consider the case upon its final hearing.

Under these circumstances we have thought bes
gest to the court to appoint three commissioners, who
in a way as masters, and who shall take testimony a
or cause to be made, the necessary surveys and repo
court a suggestion, possibly in the form of a sugges
of decree, for the information of this court in making
decree.

The reasons bearing upon this matter and indu
complainant in the case to make this suggestion are
ordinary examiner or an ordinary master will not un
a great deal of the testimony. There is an apparen
difference between the parties as to what certain ma
what certain indications on the ground show, and s
who have gone upon the ground and are thoroughly
with it, yet differ about what the appearances there
and there is a wide difference between them as to wh
survey has been called "the principal range of mou
there being several ranges and spurs there.

Under these circumstances we have thought th
missioners of scientific attainments would be t
proper persons to appreciate the testimony that would
duced, would thoroughly understand the surveyo
would testify, and by going upon the ground would
bled, from a surveyor's point of view, to appreciate t
tion better than anybody, and that such course w

this important case, give the greatest light to the court and enable it better to determine the contest between the parties in exact accordance with the real facts.

STATE OF NORTH CAROLINA,
By T. W. BICKETT,
Attorney General.

C. B. MATTHEWS,
F. A. SONDLEY,
THEO. F. DAVIDSON,
Of Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 4, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

BRIEF ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT.

T. W. BICKETT,
Attorney General of North Carolina,
THEODORE F. DAVIDSON,
C. B. MATTHEWS,
Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

BRIEF ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT.

In this amended bill of complaint, which we now ask leave of court to file, paragraphs 6 and 7 of the original bill are transposed, so that former paragraph 7 is now paragraph 6, and former paragraph 6 is now paragraph 7. It seemed logical to make this transposition, and this does not affect the merits of the bill. In paragraph 6, on page 7 of the record of the amended bill of complaint and motion for leave to file same, certain matter has been inserted as to the part of the State line which has fallen into dispute. This was inserted merely for the purpose of making more accurate the controversy in the case. On page 8 of the record of the amended bill and motion for leave to file same, in line 8, the words "a short distance" are substituted in place of the mileage.

In paragraph 8, on page 10, in the 8th line, the word "show" is changed into "showing." And on page 11 of the amended bill of complaint and motion for leave to file same 10th line, the mileage of the disputed land is made "twenty miles" instead of "ten miles," as in the original.

It will be seen that these are simply corrections for the purpose of setting forth more accurately the exact matter in dispute, and do not concern in any way or manner the relief asked for in the original bill or the grounds of it.

Respectfully submitted,

T. W. Bickett,
Attorney General of North Carolina.

Theodore F. Davidson and
C. B. Matthews,
Counsel for Complainant.

Office Supreme Court, U. S.
FILED.
MAY 4 1909
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

BRIEF FOR COMPLAINANT IN OPPOSITION TO THE MOTION OF THE BABCOCK LUMBER & LAND COMPANY FOR LEAVE TO FILE PETITION TO INTERVENE AND BECOME A PARTY DEFENDANT IN THIS CASE.

T. W. BICKETT,
Attorney General of the State of North Carolina.

THEODORE F. DAVIDSON,
C. B. MATTHEWS,
Of Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT

vs.

THE STATE OF TENNESSEE.

Brief for Complainant in Opposition to the Motion of the Babcock Lumber & Land Company for Leave to File Petition to Intervene and Become a Party Defendant in This Case.

The complainant submits that this suit is a controversy between the State of North Carolina and the State of Tennessee, and does not involve the question of property, but does involve the question of sovereignty and jurisdiction, and these alone are the questions that can be considered and adjudicated in this suit; and that an attempt to interject the rights of individuals or private persons into this suit would involve the determination of private rights and private property; would make necessary that the other parties and claimants to the property set up by the petitioners to intervene would become necessary parties, and it would thus be seen that the suit would degenerate from a controversy between

Sovereign States as to their boundaries and jurisdiction into a litigation between private parties as to their respective titles to some of the lands which might be included in the disputed territory.

Further, if this party who now seeks to intervene is a proper and necessary party, then many other parties stand in the same category. Such a proceeding, we submit, is unheard of and is not supported by precedent or reason.

In support of this contention we submit the following points:

1. Under section 2 of article 3 of the United States Constitution, the Federal judiciary is given jurisdiction over controversies between one or more States. Section 3 of that article gives this court original jurisdiction in such cases. The 11th Amendment of the Constitution deprives Federal courts of jurisdiction over controversies or suits by a citizen against a State.

Taking all of these provisions of the Constitution together, our first proposition is that this court has no jurisdiction of a controversy or suit between a State and another State and citizens of a third State; so that if this party is permitted to intervene, it would at once oust the jurisdiction of this court, since in effect it would be enabling the interveners to maintain an action against the State of North Carolina without the consent of that State, because if they merely defend in the petition, it is open to the objection that the State of Tennessee is amply able to defend its own interests; and if, on the other hand, they seek affirmative relief, then it is obnoxious to the proposition that no State can be sued by a citizen without its own consent.

2. The subject-matter of this controversy is a State line. Nobody is interested in that subject-matter except the two States. Indirect consequences of fixing the line affecting private interests do not concern the States. They are property rights to be settled between private parties in some other

manner. If private rights on either side will suffer, it is because their rights are limited and defined by the true location of the State line, and because that location can only be determined by compact between the States or litigation in this court. Their rights are referred to and limited by a fact that can only be determined in the manner indicated. There is some analogy between the situation here and the situation of a surety on an executor's or guardian's bond who is bound by the settlement of the accounts of the executor or guardian by the probate court, although the surety is not party to such proceedings, but he has contracted with reference to that method of settling the matters between the principal and the beneficiaries.

3. In *Fowler vs. Lindsay, 3rd Dallas, 411*, which was a suit in ejectment arising out of the fact that a State line between Connecticut and New York had never been authoritatively settled, the State of New York tried to intervene, and this court held that a decision as to the right of soil between individual citizens can never affect the right of the State as to the soil or jurisdiction. Afterwards, in the case of *New York against the State of Connecticut, 4 Dallas, 1*, the State of New York tried to enjoin the prosecution of suits depending on that State-line location, and this court denied the right of the State to interfere in the matter in any way, on the same ground, to wit, that it was not a party in interest nor affected in any way by any litigation between private parties. The rule certainly works both ways.

In *Florida vs. Georgia, 17th Howard, 478*, the United States tried to intervene on the ground that it had an interest in the exact subject-matter of that litigation, to wit, the location of the State line. This court held in that case that it was true that the United States did have an interest therein and could agree or disagree to any compact settling the State line, and therefore that it was its duty to watch

litigation with reference thereto, and in a qualified way granted the motion, but said:

"The United States will not by this proceeding become a party in the technical sense of the word, and no judgment will be entered for or against them, but the evidence and arguments offered in their behalf will be considered by the court in deciding the matter in controversy."

The court further said that the United States would not be permitted to have any control over the pleadings or evidence or stipulations of the States, but its matter and its arguments would be taken into consideration by the court.

In *Rhode Island against Massachusetts, 12 Peters, 657*, the argument was made that this court had no jurisdiction of the case, and one of the reasons urged was that there were some five thousand citizens of the State of Massachusetts whose rights would be affected, and therefore that the court could not pass upon the subject-matter of that litigation without their presence in court. The court said:

"It is said that the people inhabiting disputed territory ought to be made parties as their rights are affected. It might with the same reason be objected that a treaty or compact settling boundary required the consent of the people to make it valid, and that a decree under the 9th article of the Federation was void, as the authority to make it was derived from the legislative power only."

It would seem, therefore, that wherever the matter has been presented in this court two propositions have been held to be undeniable: One is that a State has no interest in private litigation, and on the other hand that private parties have no interest in the settlement of boundary lines between States, either by compact or by suit.

4. In the petition and exhibit that are sought to be filed by the Babcock Lumber and Land Company it is alleged, on page 11, as follows:

"That it appears by the record in the suit between Charles Hibard and David W. Belding *et al.* that one C. B. Matthews was attorney for the defendant in that suit, and that he is now associated with the Attorney General of the State of North Carolina in the present suit, brought by the State of North Carolina against the State of Tennessee in the Supreme Court of the United States, and it is fair to conclude that the act of assembly, ratified February 14, 1909, authorizing the Governor of the State of North Carolina to institute and prosecute, in the name of and in behalf of said State, in the Supreme Court of the United States, such actions and proceedings as might be necessary to establish and protect the boundary lines between the State of North Carolina and adjoining States was obtained by and through the same parties defendant to the original suit to review the decision of the Circuit Court of Appeals in the original suit—a thing which could not be done by appeal or on certiorari and ought not to be countenanced or permitted by this court."

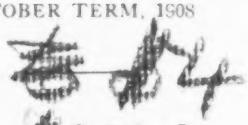
This is entirely erroneous, as C. B. Matthews was not concerned with or in any way connected with original litigation mentioned and had nothing whatever to do with the passage of the law mentioned, and this is the matter that counsel for the Babcock Land and Lumber Company stated in open court that it would correct. If it were true as alleged, it would be utterly immaterial.

The reason why the State of North Carolina has seen fit to authorize this action on her behalf is that there was much contention between private parties over land titles, which was brought about by what might be called the loss and obscuration of the State line, as alleged in the bill. It is usually such litigation between private parties that brings about the necessity for a settlement of the State line. As shown by the bill, not only was there litigation, but there have been collisions in matters of sovereignty and juri-diction. If everything were going along quietly and there were no contentions, litigation might not be necessary; but, on the other hand, uncertainty of the location of the line and constant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908



No. 1, Original.

The State of North Carolina, Complainant,

vs.

The State of Tennessee, Defendant.

Brief of The Babcock Lumber & Land Company, Petitioner.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
Attorneys for Petitioner.

Pittsburgh Printing Company

IN THE

Supreme Court of the United States

October Term, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, *Complainant,*

vs.

THE STATE OF TENNESSEE, *Defendant.*

Brief On Behalf Of The Babcock Lumber & Land Company, Petitioner.

The question as to the right of intervention is not a jurisdictional question. The Supreme Court of the United States having jurisdiction, under the Constitution, over a controversy between the States of North Carolina and Tennessee, has the right to permit the intervention of any person who is interested in the results of the case, regardless of whether it would otherwise have jurisdiction over that person or not. The intervention of the petitioner could not qualify or change, in any way, the jurisdiction of the court obtained before the filing of the petition to intervent. A petition to intervene can always be allowed when the petitioner can show that he has an interest in the results of the case.

Metropolitan Railway Receivership, 208 U. S. Supreme Ct. Repts., 90.

In the case of *Fowler vs. Miller*, reported in 3rd Dallas Reports, 410, the reason the State of New York was refused a

writ of certiorari to remove the case pending between individuals into the Supreme Court of the United States, was that the State, having parted with the soil, had no interest in the controversy and would not be concluded by it; that it still would have the right to determine its jurisdictional lines in a suit brought by itself, regardless of the results of the suit then pending. There was no question whatever raised as to intervention in that suit.

The case of *New York vs. Connecticut*, reported in 4 Dallas, page 1, was a Bill in Equity filed by the State of New York in the Supreme Court of the United States against the State of Connecticut, for an injunction against the State of Connecticut and its grantees, to prevent them from prosecuting actions of ejectment in the States of New York or Connecticut for the recovery of the lands that had been declared to be theirs in the Circuit Court of the State of Connecticut. The Supreme Court in that case decided that the State of New York, not being a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.

But there was no petition to intervene filed in either of these cases. The court simply held, in the first case, reported in 3 Dallas, that the State of New York had no standing to petition the removal of the cases into the Supreme Court of the United States because it had parted with its title to the lands claimed to be in New York and had only the jurisdictional title left, which would not be affected by the decision of the courts as to individuals. And in the second case, reported in 4 Dallas, the only thing there decided is that the State of New York had no right to enjoin the State of Connecticut and its grantees from prosecuting suits to perfect their titles to the lands in controversy, because those suits would not affect the right of the State of New York, it having parted with its title to the soil, to thereafter determine the jurisdictional question between the States. The issue in both cases was the rights of private parties, in which the States were not interested at all.

These two cases, relied upon by the State of North Carolina, are easily distinguished from the present case in this,—in the one case the State of New York sought to remove the case into the Supreme Court of the United States, and in the other case the State of New York sought to enjoin the State of Connecticut and its grantees from prosecuting their suits for the soil, the Court simply holding that the contest between the grantees of the States for the title to the soil did not affect the jurisdictional question between the States. Our case is different in this: That the determination of the jurisdictional rights between the States of North Carolina and Tennessee would materially affect the rights and position of this petitioner.

Having established, as we think, the right of the court to permit intervention by parties who are interested in the results of the case in which they wish to intervene, we come to the only remaining question in this case, and that is whether the petitioner, the Babcock Lumber & Land Company, is interested in the results of this suit.

The petitioner filed with its petition a certified copy of the record of the case of Charles Hebard against David W. Belding, et al, in the Circuit Court of Appeals in and for the Sixth Circuit, as a part of its petition and as evidence of the facts therein set forth. It therein appears that one Charles Hebard, having purchased lands from the State of Tennessee and its grantees, filed his Bill in Equity against David W. Belding, et al, to clear his title to certain lands lying between the Foldderstack Range and the Hangover Range, in Monroe County, Tennessee. That after much testimony taken, argument and litigation, it was decided by the Circuit Court of Appeals in and for the Sixth Circuit that the state line between these two states, upon which the controversy was founded, was on the Hangover Range. Therefore, that was a final adjudication and determination of the suit between the said parties, and is *res adjudicata*, as well as *stare decisis* in the present case.

This petition and record also shows that after the final adjudication and location of the state line between these two States, the plaintiff, having bought the land, from the State of Tennessee and its grantees, extending to the state line between North Carolina and Tennessee as claimed by Tennessee, and the defendant having bought from the State of North Carolina and its grantees the land extending to the state line between the States of North Carolina and Tennessee as claimed by the State of North Carolina, and after a petition for rehearing was filed by David W. Belding, et al, heard and decided against them, refusing said re-hearing, then the petitioner purchased the land in controversy lying between the Fodderstack and Hangover Ranges, from the grantees of Charles Hebard, for a valuable consideration, and entered upon and is now in possession of the same. The petition also shows that after the purchase by the petitioner of the lands in controversy, William R. Hopkins, et al, purchased from David W. Belding, et al, whatever right, title and interest the said David W. Belding, et al, had in and to the lands in controversy, lying between the Fodderstack and Hangover Ranges.

We desire to state that while C. B. Matthews was not the attorney of record in the original litigation between Charles Hebard and David W. Belding, et al, he was the attorney who represented W. R. Hopkins, et al, in their petition, filed in the Circuit Court of Tennessee, for permission to file Bill of Review, and he has taken testimony under that petition for Bill of Review, argued the matter in said Court and had the Bill of Review allowed for the said W. R. Hopkins, et al. And it appears by the record in this present suit, that the said C. B. Matthews is the attorney, or one of the attorneys representing the State of North Carolina.

While, as was held in 3 Dallas, the States of North Carolina and Tennessee would not be precluded or bound by a decision as to land titles in litigation between private parties where the question of the state line was in issue, yet where the determination of the state line is between two states, the effect

of that decision by this court, fixing the state line will be an adjudication against the interest of your petitioner, and may, if the court should so find the location of the line, deprive it of its property.

If the Babcock Lumber & Land Company is not permitted to intervene in this present suit, in the event the Supreme Court of the United States finds the line between the two States to be on the Fodderstack Range, and the Circuit Court of Tennessee, in the Bill of Review there pending, changes the former Decree and follows the opinion of the Supreme Court in this case, finding the state line between the States to be on the Fodderstack Range, your petitioner will thus be deprived of the land which it has bought and paid for, and in possession of, lying between the Hangover and Fodderstack Ranges, without an opportunity of being heard at all.

And as a further reason why this petitioner should be allowed to intervene, there are certain lines of defense which the petitioner might interpose and which the State of Tennessee as defendant might not care to set up; and in addition thereto your petitioner, having expended large sums of money in investigation and securing of testimony to establish the location of the state line between the States of North Carolina and Tennessee as herein in dispute, is in a position to facilitate the court and better enable it to arrive at a just and true determination as to the location of this state line.

While it may be true that the result of this suit will not affect the States except to establish the line between them, yet they, having parted with their right to the soil, it will affect their grantees, and particularly affect this petitioner, who purchased from the grantees of the State of Tennessee after a decree of the Circuit Court of Appeals of the Sixth Circuit, establishing and fixing the line.

The petitioner and William R. Hopkins, et al, both purchased said land from the grantees of the different States after the decree of the Circuit Court of Appeals of the Sixth Cir-

cuit, establishing the line on the Hangover Range, but the difference between them is that this decree was rendered in favor of the plaintiff, Charles Hebard, before the petitioner purchased said lands, and also against the defendant, David W. Belding, before William R. Hopkins, et al, purchased from said David W. Belding, et al, so the said William R. Hopkins, et al, knew they were buying a law suit when they purchased. The equities therefore, of the two parties, are not similar.

As the court may not understand from the record and the maps included, the true situation concerning this litigation, we again state, that this land in controversy extends from the Tennessee River southwest about nine miles. That going southwest from the river, on the right hand is the mountain range called the Fodderstack; that going southwest from the river, on the left hand is the mountain range called the Hangover; that these two mountain ranges are about three miles apart; that the land in controversy lies between these two ranges, the ranges coming together about nine miles from the Tennessee River. Therefore, if the line, as established by the Circuit Court of Appeals for the Sixth Circuit, shall remain on what is called the Hangover range, the land in dispute, lying in what is called the Slick Rock Valley, between the Hangover Range and the Fodderstack Range will belong to this petitioner, and if it shall be decided in this present suit that the state line lies and runs over the Fodderstack Range, then the Circuit Court of Tennessee, in the Bill of Review aforesaid, will undoubtedly find the line to be where the Supreme Court of the United States finds it to be, and this petitioner will lose the five or six thousand acres which it has bought and paid for, and now is in possession of, lying between the Fodderstack and the Hangover Ranges. And while the determination of this state line in this manner will not benefit the States, with reference to the acquisition of more territory, yet it will very much benefit William R. Hopkins, et al, whose attorney is assisting the Attorney General of the State of North Carolina in the present suit.

Further, if the Supreme Court of the United States, in this case should decide the state line to be on the Fodderstack Range, such determination, being had by the Court of last resort in the United States, would be a final adjudication as to the location of that line, and which adjudication the Circuit Court of Tennessee in the Bill of Review now pending, would be bound to follow.

The practice of permitting petitioners to intervene is more liberally followed now than formerly. Now, when a person shows that he is interested in the result of the suit in which he wishes to intervene, there usually is no hesitation in permitting such intervention. The Attorney General of the United States was recently permitted to intervene by this court, in a suit pending between individuals, although the United States was not a party, upon showing that it was interested in upholding the constitutionality of an Act of Congress.

It may be here stated that the Attorney General of the State of Tennessee, defendant in the present suit, has filed his permission, in writing, for the petitioner to intervene.

There seems to be no reason why the State of North Carolina should object to the intervention of the petitioner, except that it might be fearful of some adjudication or showing detrimental to the individual rights or claims of some of its grantees, as North Carolina claims that the only question involved is a jurisdictional question, and admits, or at least does not deny, that it has sold its soil to other people. And where it is apparent that the jurisdiction of the Supreme Court of the United States is sought for the purpose of working out remedies to individuals and not the plaintiff stated, such litigation should not be encouraged.

The sole argument of the complainant, in reply to the petition to intervene, is based alone on the idea that its purpose is to simply locate and establish this portion of the state line between the States of North Carolina and Tennessee for jurisdictional purposes, and yet, on page 7 of its brief, it says:

> "We feel, therefore, that in contesting the intervention of the Babcock Land and Lumber Company we are only calling the attention of the court to undoubted principles of law and of procedure.
>
> Should the court grant the petition and allow the petitioner to intervene, the complainant craves leave and opportunity to answer the petition *as there are several several facts alleged therein, particularly as to the quantity of land and the ownership thereof by private parties, which it desires to contest.*"

We therefore submit that this statement in the brief of the complainant, is not altogether consistent with its sole purpose of establishing the line between the two States for jurisdictional purposes, and indicates that the State of North Carolina has lent its name and office to individuals, to work out their private contest with the petitioner over the title to the land, which title the State of North Carolina has long since parted with, because to determine the quantity of land and the private ownership thereof by private parties could have no relevancy whatever in the contest between the States for jurisdictional purposes. The State of North Carolina will not be bound by the quantity of land nor the ownership thereof by private parties, and it can establish its jurisdictional line at any time where it has not been established by a court of competent jurisdiction. We further submit, therefore, that a careful reading of the petition filed, supports the inference and belief that this present Bill is filed not alone for the State of North Carolina, although by

North Carolina, but through the influence of private parties who wish to try over again what has already been tried and adjudicated, to wit: the establishment of a certain portion of the line between the States. And for this reason this petitioner should be allowed to intervene, in order to protect its interests, which will be materially affected thereby.

In the case of the State of Louisiana against the State of Texas, reported in 176 United States Reports, page 1, the Supreme Court of the United States decided that in order to maintain jurisdiction of a bill, it must appear that the controversy to be determined was a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in vindication of the grievances of particular individuals. Referring to the Bill of Complaint filed by the State of North Carolina in this case, how can this controversy as presented to this court be other than in vindication of the grievances of particular individuals? While the Bill of Complaint sets forth that it is filed by the State of North Carolina in order to secure its right of sovereignty and jurisdiction, yet it avers that the only breach of this right has been the making of grants to lands by the State of Tennessee within the disputed territory, and particularly refers to the grant to the predecessors in title of this petitioner, setting forth that the result of these grants has been litigation as to the ownership of the lands granted. There is no averment of any conflict of sovereignty or jurisdiction between the States of North Carolina and Tennessee. There is no averment of conflict in the collection of taxes, or other governmental powers, nor does the Bill aver that in good faith the State of North Carolina attempted to adjust this matter with the State of Tennessee, or a new Commission authorized to meet and properly

locate this line, which commission failed to agree. As was said in said case of Louisiana against Texas:

> "In the absence of agreement, it may be that a controversy might arise between two states, for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them and the subject matter must be susceptible of jurisdictional solution. And it is difficult to conceive of a direct issue between two states in respect to a matter where no effort at accommodation has been made."

The real object of the present Bill therefore, although filed in the name of and by the State of North Carolina, is to settle grievances between the grantees of the respective states; and while it may aver that it is filed to determine sovereignty and jurisdiction, its very allegations contain sufficient facts to show that there is no dispute between the states. And why should this petitioner, having an interest in the result of this case, be refused permission to intervene and defend as against the State of North Carolina and the real plaintiffs, Hopkins, et al, when the object of the Bill filed is apparent to all as being in vindication of the grievances of Hopkins, et al, your petitioner's opponents in the case heretofore tried to determine the title to lands?

Respectfully submitted,

John Franklin Shields,
William A. Stone,
Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 14, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

OBJECTIONS OF DEFENDANT TO MOTION FOR LEAVE TO FILE AMENDED BILL AND BRIEF IN SUPPORT OF OBJECTIONS.

CHARLES T. CATES, JR.,
Attorney General of Tennessee, for Defendant.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

Objections of Defendant to Complainant's Motion for Leave to File the Amended Bill Exhibited Therewith.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On the —— day of March, 1909, the complainant, the State of North Carolina, was by this honorable court granted leave to file against the State of Tennessee an original bill in equity, and on the —— day of April, 1909, the State of Tennessee, through her Attorney General, entered her appearance to said bill, obtained a copy thereof, and was given until the first day of the next term of this court to make defense thereto.

The complainant, State of North Carolina, by her said bill, to which reference is here made, seeks to have determined an alleged dispute in respect of a part of the boundary between said States, the scope of the disputed boundary being specifically described and restricted to that part of the line between said States, as follows: "Between a point about a mile

northeast of the Tennessee River and the junction of the Big Fodderstack and the Hangover leads, about *nine miles* southwest thereof" (see original bill, p. 10); but now defendant shows that on May 12, 1909, she was notified by counsel representing complainant that on Monday, the 25th day of May, 1909, a motion would be submitted to this honorable court for leave to file an amended bill of complaint, and a copy of said amended bill accompanied such notice.

Now comes the defendant, State of Tennessee, and respectfully submits to this honorable court the following objections or exceptions to said amended bill (so styled) and the filing thereof:

First. Said amended bill in the form submitted is unknown to the rules of this court and the well-recognized rules of equity practice.

Second. Said amended bill does not in any way refer to the original bill, nor give the substance thereof, nor set out or particularize the matters of amendment sought to be incorporated into or engrafted upon the original bill, so that the court and the defendant may see and understand the changes in or additions to the allegations of the original bill.

Third. Neither said amended bill (so styled) nor the affidavit appended thereto shows any reason for altering the allegations of the original bill or making any addition thereto, nor is it shown that the matters of amendment were unknown to complainant at the time the original bill was filed.

Fourth. The paper submitted and offered to be filed is not an *amended* bill, according to the well-recognized rules of equity practice, but is in fact and effect a new and independent bill, setting out *verbatim* the first five paragraphs of the original bill, then for the sixth paragraph of the original bill substituting the seventh paragraph thereof, into which

without specification, have been incorporated additional allegations, and wherein certain allegations of the original bill have been altered in a material manner; then follows the sixth paragraph of the original bill as the seventh paragraph of the so-called amended bill; then follows, as the eighth paragraph of the amended bill (so styled), a large part of the eighth paragraph of the original bill, but changing without setting out or specifying the changes, certain material allegations of the original bill; these changes and alterations of the original bill can be ascertained only by comparing word for word the allegations of the eighth paragraph of the original bill with the eighth paragraph of the amended bill sought to be filed; and this objection applies to the changes made in the seventh paragraph of the original bill; some of these additions and material changes will be specifically set out in the brief filed in support of these objections.

Wherefore, for the reasons above stated and for the further reason that if said amended bill is permitted to be filed defendant cannot with any degree of certainty understand the particular allegations which may be material and necessary for her to answer, defendant respectfully submits that said amended bill (so styled) should not be allowed to be filed in the form submitted.

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

BRIEF IN SUPPORT OF DEFENDANT'S OBJECTIONS TO THE AMENDED BILL SOUGHT TO BE FILED BY COMPLAINANT.

We respectfully submit that the paper submitted to the court and sought to be filed as an amended bill should set out the substance of the original bill, and specifically point out the parts thereof sought to be amended or changed, and that any additional matters sought to be incorporated in the original should be specifically set out, so that the court may see and understand the effect thereof and in order that the defendant may be given notice of the particular matters which must be answered.

We do not insist that the original bill should be set out at length, but only such parts thereof as may be necessary to introduce and make intelligible the matters of amendment, which should constitute the chief subject of the amended bill.

Pierce v. West's Ex'rs, 3 Wash., 354, 355.

Further, we submit that in courts of equity the rule is well settled that an amendment to the original bill must be consistent therewith, and must be made without striking out any part of the original bill, but by introducing the new matter by way of supplement thereto.

Verplanck v. Meret. Ins. Co., 1 Edw. Ch., 46.
Rogers v. Rogers, 1 Paige, 124
Whitmarsh v. Campbell, 2 Paige, 267

Now, it is obvious that, except that the paper submitted is styled an amended bill, your honors would never suspect that it was intended to perform the functions of an amendment to an original bill, and only by a careful scrutiny of each line of the original bill is it possible to discover the

changes made in the seventh and eighth paragraphs thereof, as these paragraphs are altered and converted into the sixth and eighth paragraphs of the amended bill.

It is not our intention to insist upon a more rigid application of the rules of practice than is necessary to enable us to see and properly understand the matter to be defended against; but we do respectfully insist that in a matter of such grave concern and importance to the defendant, State of Tennessee, the complainant should be required to state her case with a reasonable degree of certainty, and to show cause for making material changes in the allegations of her bill in relation to the course of the boundary alleged to be in dispute and the scope and extent of such dispute.

In Rogers *v.* Rogers, 1 Paige, 424, upon application to amend an injunction bill, the Chancellor held that the amendments proposed must be merely in addition to the original bill, and not inconsistent with it; and the complainant must swear to the truth of the matter proposed to be inserted by way of amendment, *and show a valid excuse for not having incorporated it into the original bill.*

The case of Rogers *v.* Rogers was cited with approval in Verplanck *v.* Meret. Ins. Co., 1 Edw. Ch., 53, which is a case very much in point as sustaining the rule invoked upon behalf of defendant in this case.

To the same effect see Whitmarsh *v.* Campbell, *supra*.

The case of Verplanck *v.* Meret. Ins. Co., *supra*, has been cited with approval and followed by this court in Shields *et al. v.* Barrow, 7 How., 130.

An examination of the original bill will show (p. 10) that it is alleged that the boundary between the two States in dispute is that part of said boundary "between a point about a mile northeast of the Tennessee River and the junction of the Big Fodderstack and the Hangover lands, about nine miles southwest thereof" —that is, a part of said boundary line "about ten miles long." In order that your honors may understand some of the additions and material

changes made in the seventh and eighth paragraphs of the original bill, it is proper to note that the boundary line between the States of North Carolina and Tennessee, as set out in the fifth paragraph of the original bill, crosses "Tennessee River at a distance of sixty-five miles from the beginning."

Now, by carefully comparing the seventh paragraph of the original bill with the sixth paragraph of the amended bill, it will be seen that there has been inserted in the original bill, between the words "Unaka Mountain" and "has fallen," in the sixth line from the top of page 7 of the original bill as printed, the following: "And thence to the point mentioned and designated in the report of the commissioners who made the survey in 1821, as set forth in paragraph five hereof, at the Unicoi or Unaka turnpike road where a cornerstone is set and marked "Ten" on the west side and "N. C." on the east side, and where a hickory tree is also marked on the south side "Ten. 101 m.," and on the north side "N. C. 101 m." *being 101 miles from the beginning.*"

Now, as shown above, the boundary line crosses the Tennessee River at sixty-five miles from the beginning, and the extent of the disputed boundary, as set out in the original bill (pp. 7-10), was from the Tennessee River, or a point a mile northeast thereof, to the main ridge of Unaka Mountain—the junction of the Big Fodderstack and the Hangover leads (original bill, pp. 7-10). Did the complainant by the insertion of the additional matter hereinbefore set out and quoted intend to lengthen the extent of the disputed boundary beyond the Unaka Mountain, the junction of the Big Fodderstack and Hangover leads, and from a line ten miles long to one thirty-six miles in extent? We submit that, in the form complainant has submitted its so-called amended bill, defendant cannot know with reasonable certainty what she has to defend against.

Moreover, a further examination of the seventh paragraph of the original bill, when compared with the sixth para

graph of the amended bill, will show that the allegation solemnly made by complainant in respect of the course of the boundary line west of the Tennessee River is that it follows Slick Rock Creek "about five miles" to a ridge leading to the summit, known as Big Fodderstack Mountain, etc. It is manifest that this allegation was intended to mean that the boundary line followed a natural object—that is, a water course—for a distance of "about five miles," but in the sixth paragraph of the amended bill this material averment is changed from "about five miles" to "a short distance" (amended bill, p. 6, line 8).

There are other material changes in and additions to the allegations of the seventh and eighth paragraphs of the original bill, which we do not deem it necessary to here point out, nor do we think that the business of this court or of the defendant to be compelled to ascertain the same by comparing word for word the allegations of the original bill with those of the amended bill.

Further, in addition to our insistence that these matters of amendment are not submitted in such form as entitle them to be filed, for the reasons above stated, we submit that the application to strike out an allegation from a sworn bill or to make alterations therein should be accompanied with affidavits showing how the mistake occurred, and that the facts were not known to complainant at the time the original bill was filed

North River Bank *v.* Rogers, 8 Paige, 648
Whitmarsh *v.* Campbell, 1 Paige, 267
Everett *v.* Winn, 1 S. M. & M., 67.

And in Rogers *v.* De Forrest, 3 Edw. Ch., 171, it was held that the truth of the matter proposed as an amendment should be sworn to in addition to the ordinary *prout* upon the petition for leave to amend.

In Verplanck *v.* Merct. Ins. Co., *supra*, it was held that the rules of equity practice herein insisted upon applied not only to injunction bills, but with equal force to all cases of

sworn bills, and that it was never proper to permit the striking out of one averment and the substitution of another, or to permit material matters of amendment without a showing on oath that such matters have come to the knowledge of the complainant since the filing of the original bill.

Further, we submit to your honors, if this bill is permitted to be filed, how can the State of Tennessee properly defend against the allegations of both the original and the amended bills?

In submitting our objections to this amended bill, it is not our purpose to seek to deprive complainant of any right to an amendment necessary to protect her interests, but only to require that such amended bill be submitted in proper form and contain such a degree of clearness and precision in the matter of amendment that the defendant may be enabled to make her defense thereto, and to require complainant to show cause why she now seeks to change her solemn averments in relation to the course and extent of the boundary line alleged to be in dispute.

Respectfully submitted,

CHARLES T. CATES, JR.,
Attorney General of Tennessee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 4, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

BRIEF ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT IN ANSWER TO DEFENDANT'S BRIEF ON SAME MOTION.

T. W. BICKETT,
Attorney General of North Carolina,
THEODORE F. DAVIDSON,
C. B. MATTHEWS,
Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 13, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE.

Brief on Motion for Leave to File Amended Bill of Complaint in Answer to Defendant's Brief on Same Motion.

This motion was to have been submitted on the part of the complainant on Monday, the 17th, but owing to the desire of the Attorney General of the State of Tennessee, it is submitted today, the 24th. Opposition is made to the filing of this amended bill.

Rule 28 in Equity provides, among other things, speaking of the plaintiff:

> "But if he amend in a material point (as he may do, of course), after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him with a fair

copy thereof, free of expense, with suitable reference to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended."

The defendant was furnished with a copy of the whole bill as amended, printed, and also copy of the brief, printed, and filed some ten days or two weeks ago, as the records of this court will show.

The amendments are these:

1. Paragraph 6 was placed as paragraph 7, and *vice versa*.

2. In the 6th paragraph, on page 7 (paragraph 7 in original bill), the following words have been inserted: "And thence to the point mentioned and designated in the report of the commissioners who made the survey in 1821, as set forth in paragraph five hereof, at the Unicoi or Unaka turnpike road, where a corner stone is set and marked 'Ten.' on the west side and 'N. C.' on the east side, and where a hickory tree is also marked on the south side 'Ten. 101 m.' and on the north side 'N. C. 101 m.,' being 101 miles from the beginning."

3. On page 8 of the record of the Amended Bill and Motion for Leave to File Same, in line 8, the words "a short distance" are substituted in place of the mileage mentioned.

4. In paragraph 8, on page 10, in the 8th line, the word "show" is changed into "showing."

5. On page 11 of the Amended Bill of Complaint and Motion for Leave to File Same, 10th line, the mileage of the disputed land is made "twenty miles" instead of "ten miles," as in the original.

These changes are simply to put the bill in more correct form and more accurately describe the matter in dispute.

Respectfully submitted,

T. W. BICKETT,
Attorney General of the State of North Carolina.

THEO. F. DAVIDSON,
C. B. MATTHEWS.
Of Counsel.

[Endorsed:] Supreme Court of the United States. October term, 1908. No. 13, original. The State of North Carolina, complainant, *vs.* The State of Tennessee. Brief on motion for leave to file amended bill of complaint in answer to defendant's brief on the same motion. T. W. Bickett, attorney general of the State of North Carolina. Theo. F. Davidson, C. B. Matthews, of counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 4—ORIGINAL.

STATE OF NORTH CAROLINA,
COMPLAINANT,

vs.

STATE OF TENNESSEE,
DEFENDANT.

IN EQUITY.

Abstract and Analysis of Evidence in the Record Prepared by the State of North Carolina.

THOMAS W. BICKETT,
Attorney General of North Carolina.

THEO. F. DAVIDSON,
C. B. MATTHEWS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 1 Original.

STATE OF NORTH CAROLINA,
Complainant,
v.
STATE OF TENNESSEE,
Defendant.

In Equity.

Abstract and Analysis of Evidence in the Record Prepared by the State of North Carolina.

The complainant offered in evidence the Act of 1819 of the North Carolina Assembly and the Act of 1820 of the State of Tennessee (Record, 81, 82, 83), out of which act grew the appointment of the joint commission who ran the State line at the disputed points in 1821.

The first Act, Section 2, provides as follows:

> "And this State will at all times ratify and confirm all and whatsoever the said Commissioners, or a majority of those of each State shall do in and touching the premises binding on this State."

The Tennessee Act, Section 3, provides that:

> "Whatsoever the said Commissioners, or a majority of those of each State shall do in and touching the premises, shall be binding on this State."

So that it was apparently present in the minds of the respective legislatures that nothing in the Cession Act, nor in the Acts providing for the appointment of these commissioners, was definite enough to make the action of the Commissioners merely ministerial and that there was some discretion and room for difference of opinion with reference to the duties which they would be called upon to perform.

The report of the Commissioners of 1821 (Record, 83) was next introduced, and it is advisable to draw the attention of the Court to portions of the language in that report. They recite that:

> "Having met at the Town of Newport in the State of Tennessee, on the 16th day of July, 1821, to settle, run and mark the dividing line between the States from the termination of the line run by McDowell, Vance & Matthews, in the year of our Lord, 1799, to the southern boundary of the said States, respectfully report that we proceeded to ascertain, run and mark the said dividing line as designated in the 11th article called The Declaration of Rights of the Constitution of the State of Tennessee and in the Act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands thereon described,' passed in 1789."

In reference to crossing the Tennessee River this language is used:

> "And crossing the Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same where it is called Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Over-Hill Towns, near the head of the west fork of the Tellico River and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof at the Unicoy or Unaka Turnpike Road where a corner-stone is set up marked 'Ten.' on the west side and 'N. C.,' on the East side.

where a hickory is also marked on the south side 'Ten. 101m.', and on the north side 'N. C. 101m.', being 101 miles from our beginning," etc.

And further,

> "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of said States," etc.

On page 86 there is an admission by the respective parties that upon search of the public office of the Capitol in Raleigh, thoroughly made by the proper officials, no original or copy of the plat and survey of the Commissioners, or the field notes of the same, could be found.

The complainant next introduced the Acts of North Carolina and Tennessee confirming the said report and survey (Record, 86, 87). In the North Carolina Act, in Section 1, these words are used:

> "The whole distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree, and mile marked at the end of each mile."

Next is introduced a plat of a portion of the Ocoee Land District, situated in the State of Tennessee and including Monroe County, and in fact extending to the Georgia State line, which was made in pursuance of an Act of the General Assembly of the State of Tennessee, authorizing and directing the Surveyor General of that land district to plat the district, in which it is shown at the point in dispute and immediately southwest of the Tennessee River that the Surveyor General ended his survey at Slick Rock Creek, and in making his sections, made fractional sections along that creek.

In 1852 (Record, 89) an entry-taker's office was established by the State of North Carolina, in the county of Cherokee, which, up to 1872, included the lands constituting the present

county of Graham, through a portion of which the Slick Rock Creek runs.

Thereupon, taking the complainant's evidence in regular order there were introduced, commencing Record, 89, a large number of entries beginning with the 12th of March, 1853, and surveys and field notes of one J. W. C. Piercey, who was County Surveyor of Cherokee County at that period, and afterwards in connection with these entries and grants, a certain plat of entry No. 1035, a portion of which was in dispute in what was known as the case of *Hebard v. Belding*. These entries, surveys and grants are numerous and relate to the lands along Slick Rock Creek and also on the waters of the Tellico River constituting the two disputed portions of the State line, and take up that portion of the record from page 89 to 154. With reference to this, while it is true that it does not settle the matter for want of contending parties to make claims as to the location of the State line, yet it does show that as far back as the inception of the dealing with these lands by the State of North Carolina, it was understood evidently from common report and probably from knowledge that the State line was located as is claimed by the State of North Carolina, to wit: up the Slick Rock Creek and thence up to the Big Fodderstack, and from there to the junction, and below crossing the Tellico River and not going around its head. When we add to this the facts that the entries and grants of the lands in the neighborhood of Slick Rock Creek and in Monroe County, Tennessee, while they do not in express terms mention the Slick Rock Creek as the Eastern boundary line, do make the conveyances in grants with the fractional sections of the plat of the Ocoee Land District, and when we further consider the plat itself, which was an official document agreeing with the evidence, whatever its strength may be, with the North Carolina entries, surveys and grants, the evidence becomes cogent with reference to the location of the State line.

Judge Clark, in the case of *Hebard v. Belding*, heretofore mentioned, and in his opinion confirming the master's report in that case, says that a different question would arise if the State of Tennessee could be estopped. In that case the evi-

dence was not introduced for the purpose of creating an estoppel. The reason why the State could not be estopped is that it is sovereign and can not be sued without its own consent, but if it should consent to be sued, we take it that the ordinary rule governing the ascertainment of rights would prevail as in the case of individuals.

In this case, where the Constitution of the United States gives this Court jurisdiction original in its nature, a state may be estopped. But, be that as it may, the evidence of the concurrent acts of the two states in reference to the location of the line, if it points to the same location, would be strong.

OCOEE LAND DISTRICT SURVEY.

The State of Tennessee caused the Ocoee Land District to be surveyed about 1836, only fifteen years after the line was located in 1821, and at a time when presumably many, if not all, of the persons concerned in that location were alive and when presumably the report, map and field notes were in existence and accessible, and therefore with this strong correspondence of the authorities of both States and concurrent action thereon, the presumption would be almost irresistible that it was known at that time, especially to the authorities of Tennessee, that the Slick Rock Creek for a certain distance was the dividing line.

PHILLIPS' TESTIMONY.

The complainant then introduced sundry witnesses, who testified as to the tradition from a time long since elapsed (commencing Record, page 155). The first witness in that line of testimony was N. G. Phillips, a resident of North Carolina, seventy-nine years of age. He testified that Graham County was cut off from Cherokee County in 1872, and that he was well acquainted with one Thomas C. Tatham, who at that time had been dead for about forty years; that in about 1852 or 1853, in the presence of one Captain Steve Whitaker, Tatham talked about the State line between North Carolina and Tennessee, and stated that he was with the Commissioners who ran the line; Whitaker was desirous of

entering some land and it was important to him to know where that State line was located. Tatham stated in that interview that the line ran up Slick Rock Creek for about four miles and then ran up a ridge between two prongs of the Creek, and that the Commissioners had come down to the river and could not get across the river and located a big spruce pine tree at the mouth of Slick Rock Creek, and that after going up the spur they reached Fodderstack. He also states that Piercey, the County Surveyor, was told the same thing by Tatham, at a time when he, the witness, was present. He also testifies that he heard Steve Whitaker, a prominent man in that section and at one time a member of the Legislature, state the same thing, and in 1853 or 1854, heard one Doctor Patten say the same thing, and that the general reputation was that Slick Rock Creek was the dividing line and that no other talk was commenced until about 1892, or fifteen years ago as he expressed it. That when Graham County was laid off from Cherokee, he, the witness, ran the line for the County Commissioners, and treated Slick Rock Creek and the ridge up to Fodderstack as the line, and that he, in 1874 or 1875, divided the county into townships, running to that creek, and that Graham County always exercised jurisdiction over the territory up to that creek.

JENKINS' TESTIMONY.

Next, William Jenkins, who stated that he was seventy years old, and lived in Murphy, North Carolina; that when a young man he knew one Foster, who was then thirty-five or forty years of age, and who is since dead, and that Foster told him that he was with the party that ran the line and described it as in the same locality, and furthermore, that below they went along the State Ridge and crossed the Tellico River. He then continues that on that line as located that he had seen the State line marks, both fore and aft and side line marks, and that he had seen (Record, 167) the spruce pine about twenty yards from the mouth of the creek, and that he was there as far back as 1859, and that these marks were old marks when he saw them.

The evidence that this witness saw the pine tree at the mouth of Slick Rock Creek is very important, because in the recent survey it was evident that that tree had been destroyed by a storm and could not be identified unless a tree which was lying upon the ground was the one.

DAVID A. HYDE'S TESTIMONY.

David A. Hyde (Record, 169), who states that he is seventy-five years of age, living in Graham County, North Carolina, says that he knew J. W. C. Piercey, who was for quite a while surveyor of Cherokee County, North Carolina, and that he also knew Thomas Tatham and was present at a talk between Piercey and Tatham. This talk was about the State line between Tennessee and North Carolina. Piercey was inquiring about the State line and Tatham said it commenced at Slick Rock Creek and ran up the creek with the main divides of the mountain and ran thence to the main top of Fodderstack, and that Tatham said that he was with the Commissioners who ran the line in 1821 and they gave the name of Big Fodderstack to that range. This conversation was in 1855.

N. F. COOPER'S TESTIMONY.

N. F. Cooper, also a resident of Graham County, North Carolina, since 1838, and at the time of the taking of this deposition was eighty-two years of age, says that in 1853 or 1854 he was in Murphy, Graham County, and had a conversation with Doctor J. W. Patton, Dr. J. M. Lyle, and an old gentleman by the name of J. J. Turnbill. That in the conversation with them it appeared that Dr. Lyle had made an entry there and Piercey had surveyed it; that these men were all dead, and they stated that the line crossed the Tennessee River at the mouth of Slick Rock Creek, and that they found a tree there, a fore and aft tree, and that Piercey always told him the same.

ROPETWISTER'S TESTIMONY.

Ropetwister, a Cherokee Indian, who said he was seventy-eight years of age (Record, 174), but W. P. Taylor, who had

lived in Cherokee County, North Carolina, but was then living in Oklahoma, eighty-three years of age, says (Record, 189) that he saw Ropetwister in 1835 and that he was then a big, stout Indian and a fine ball player. Ropetwister says that Cheowah River was known by that name when he was a boy, and that he also knew Slick Rock Creek, and that his father told him a number of times that the State line crossed the Tennessee River at the mouth of Slick Rock Creek, and that he said that the Commissioners went on to the Smoky Mountain and went to a thicket, which they could not get through. They hung up a flag there and as they went on they set up a rock about three feet high on the side of a trail in the direction of Ball Play. He said after coming to the thicket they could not get through, and they came back to the mouth of Slick Rock Creek and went on the line towards Georgia. That a man by the name of Organder had pulled this rock up. That the line ran along with the Creek and that the line was marked.

WM. WILLIAMS' TESTIMONY.

William Williams, who lived in Monroe County, Tennessee, and who well knew the Slick Rock territory and was seventy-seven years old, says that his father who died in '55 or '56, told him that the line ran up Slick Rock Creek to the forks of the creek and then up to Big Stack (Record, 178), which he says below is Big Fodder Stack, and from there on to Unaka and that the line was never in dispute until about fifteen years ago, and that Bill Deputy, who is a witness for the defendant, went across the creek to evade the officers of the law who came after him. He told them he was in North Carolina and they went back. That standing on Smoky Mountain and looking across the Tennessee River, Big Fodder Stack is the main head. That he had heard Joseph Milligan, Harve Bright, John Bright, Mike Harrisson, and William Harrisson and all of the old people who lived in that neighborhood who are now dead, but were citizens of Tennessee, say it was on Slick Rock Creek. That he knew what was called Tellassee Old Trail, which crossed

Slick Rock Creek. At Record, page 181, he said that in the '50's a copper fever broke out in that country, which extended to the North Carolina side, and that entries were made in that territory, or options taken to work for copper.

He also says he heard Levi Mashburn and Clinton Hudson, old people who were then dead, say that Slick Rock Creek was the line, and that people who were evading the law of Tennessee just went across the creek, and he says that he himself did it.

JAMES WILLIAMS' TESTIMONY.

James Williams (Record, 184), eighty-five years of age, living in McMinn County, Tennessee, heard his father, who was then dead, often speak of Slick Rock Creek as the line and that it went up Slick Rock Creek to the Stack, and that everybody said that until the last few years and it was never denied until a few years ago; that his father lived in Tennessee, but went just over the Creek and located lands in North Carolina. On page 186, that his father told him that the line went up Slick Rock Creek and took the ridge to Big Fodderstack.

W. P. TAYLOR'S TESTIMONY.

W. P. Taylor, eighty-three years of age (Record, 186), who had lived in Cherokee County, North Carolina, says that he knew Thomas C. Tatham well and that Tatham died in the 50's. That in '49 or '50 in his presence Tatham told Morris that he was with the Commissioners who located the line, and that it went up Slick Rock Creek. (This was Gideon F. Morris.) That Tatham said it ran off the Smoky Mountain down opposite the mouth of Slick Rock Creek. He said they had to go down the river to ford it; that they forded it at the first ford and that they came back up the river to the mouth of Slick Rock Creek over the old trail to the mouth of Slick Rock Creek, and then went up the creek to a ridge and then to the Big Fodder Stack. That he claimed that to be the line and that one Andy Colvard in the fifties said the same thing. (Colvard long in a deed). Also old man

Upton, who lived in Madisonville, Tennessee, and the two Harrissons, Mike Harrisson and Bill Harrisson, said the same back in 1876, and that he had never heard that line doubted until he heard of this dispute; that the general reputation located the line on Slick Rock Creek. He also heard James Taylor, his brother who is dead, and Piercey say the same thing.

V. E. GRANT'S TESTIMONY.

V. E. Grant, who lived in Monroe County, Tennessee, fifty-two years of age (record, 194), says that he had heard old men talk about where the line runs and that he knew where it was located by reputation. That everybody said it was on Slick Rock Creek and then up the spur to Fodder Stack and that twenty-five or twenty-six years ago he heard Jake Shope, an old man, and Frank Schiffer, both of whom are dead, say that same thing and while in Tennessee there was some little differences of opinion, all the old men in Tennessee said the line was up Slick Rock Creek. Among others, Mike Harrisson, who died fourteen or fifteen years ago, told him the line was on Slick Rock Creek and ran five miles up that creek to the head that goes to Big Fodder Stack. That Jack Milligan, who is also dead, said the same thing. Also Jason Culberson, who died twelve years ago, eighty-six years of age, fixed the line on Slick Rock Creek, and the witness's father in law, who is seventy-seven or seventy-eight years, still living at the time he gave his testimony, said the same thing.

On page 194, he mentions Boyd McMurray having disputed it. This witness says that Hangover is hardly a ridge; that it is broken up by gaps. On page 196, he states that when any of his cattle got over Slick Rock Creek that he was notified and had to get them and bring them back, and that Dejuty claimed to live in North Carolina.

E. W. HARRISON'S TESTIMONY.

E. W. Harrison, a resident of Monroe County, Tennessee, was raised six miles from Slick Rock Creek (record, 196), a son of Mike Harrison; that he, in 1868, heard his father say the line ran up Slick Rock Creek four or six miles and

then up the ridge to Fodder Stack. That his father has been dead fourteen years. That the general reputation located the line on Slick Rock Creek. That he had heard Colonel Milligan and Jack Milligan say that in 1868, and Elbert DeLashmet say the same and that the witness had several uncles who said the line was there: John Harrison, William Harrison and Bob Belew. That his people had entered some land there. They sent John Harrison to one Tom Calloway, who said he was with the Commissioners and that the line ran up Slick Rock Creek. That these were all Tennessee people and that there was some excitement at that time about the minerals.

O. P. WILLIAMS' TESTIMONY. (Record, 299.)

This witness lives in Swain County, North Carolina. He knew surveyor H. P. Hyde, who was a good surveyor, of good character, who was one of the surveyors who ran the line for the State of North Carolina in 1897 and the witness was with him; that that survey ran from the mouth of Slick Rock Creek twenty-five miles to Beaver Dam Bald, in a southwest course; that it ran five miles up the creek, then up the ridge to Big Fodder Stack between Slick Rock Creek and Cities Creek and then to Laurel Top; thence by the State Ridge to Beaver Dam Bald. That there were marked trees up Slick Rock Creek, some of which were blocked and found to be of seventy-six years growth. That as they went up they found other side line trees. Also found them on the State Ridge and found the eighty-six mile tree. That the marks along this line seemed to have been made with the same instrument and about at the same time.

This witness was once clerk of the Superior Court of Graham County; was in the Legislature of North Carolina, and was at the time of his testimony, and had been for six years, clerk of the Superior Court of Swain County, and said that in making the survey of 1897, they made no new marks.

On page 302, he says that commencing at the Tennessee River, Hangover is in a southerly direction.

JASPER L. FAIN'S TESTIMONY.

Jasper L. Fain (record, 204), who lives in Cherokee County, North Carolina, in the neighborhood of Tellico River territory, about one hundred yards from the line as claimed by North Carolina, says that he has always voted in North Carolina and paid taxes there. That he had known State Ridge by that name for twenty-five years. That it runs southwest and that Laurel Top is about half a mile from County Corners. That he had seen State line trees on the State Ridge all the way to Jenks Ridge and had seen the eighty-six mile tree, a holly tree, marked "86 M." That he has searched the line as claimed by Tennessee around the headwaters of Tellico River by McDaniel Bald, but was never able to find any marks. That State Ridge is a main ridge running in a southwesterly direction and continues until cut in two by the river. That the other line claimed by Tennessee runs about five miles due east from County Corners and in getting on to that ridge you would drop down about 110 feet and drop on to a ridge that is up and down, which to the 101-mile tree would be about six and one-half miles further. That he blocked some of the trees on the State Ridge line, and they showed eighty-seven years of growth. On page 212 that the ridge around Tellico River by McDaniel Bald has low gaps and knobs all the way around.

A. A. FAIN'S TESTIMONY.

A. A. Fain (record, 212). This witness at the time of testifying was clerk of the Superior Court of Cherokee County, North Carolina. Speaks of the lands spoken of by the previous witness, and that they paid taxes on those lands in North Carolina and that warrants from the courts of North Carolina were issued and executed by North Carolina.

JOHN DOCKERY'S TESTIMONY.

John Dockery (record, 215), a resident of Cherokee County, North Carolina, seventy-four years of age, who occupied a tract of land in the disputed territory, said that he always paid taxes in North Carolina and had never been asked to

pay any place else, and that he had known what was called State Ridge under that name since he was a boy. That he knew well old Billy Graves and old Bill Allen, who were dead, and who both told him that they were along with the Commissioners when the line was run and helped run it, and that the line ran on State Ridge and that the witness had personally seen along that ridge a good many State line marks and that it was always known as the State line, and on page 217, that it was never disputed until Fain got into his law suit.

E. R. HUNDSUCKER'S TESTIMONY.

E. R. Hundsucker, who lived in Cherokee County, North Carolina, states that he had known State Ridge fifty or sixty years and knew William Graves well, the same Graves who was mentioned by the previous witness, and that Graves told him that he was with the Commissioners who ran the State line and that State Ridge was the line and that it crossed Tellico River. That he had owned a piece of land in the disputed territory, but had always paid taxes and voted in North Carolina and that his children went to school in North Carolina and that there was no dispute about the line in those days.

ISAAC LOVINGOOD'S TESTIMONY.

Isaac Lovingood (record, 221), seventy-seven years of age, says that he knew State Ridge where the said line ran and had known it for fifty-five or sixty years. That one Beaver, who occupied property in the disputed territory, always claimed North Carolina as his home and paid taxes in North Carolina.

D. W. DEWEESE'S TESTIMONY.

D. W. DeWeese (record, 222), lives in Murphy, Cherokee County, North Carolina, sixty-four years old, says that he had known Billy Graves well, who said he was with the Commissioners, and Graves pointed the line out to this witness, as being on the State Ridge running southwest and that he had been with Graves along that ridge many times from Tellico

to County Corners, saw the State line marks, three hacks and two hacks and a blaze. That he had known State Ridge by that name since a period of six or eight years before the war, and it was so called, as he understood it, because the State line was on it.

This witness had been the sheriff four or five times, clerk of the Superior Court twice, representative in the Legislature once, besides having held a number of minor positions. He had been mayor of the town and superintendent of the public schools, and says that the Fains and Beavers all paid taxes to him in North Carolina and that Tennessee never claimed taxes there.

DAVID ORR'S TESTIMONY.

David Orr (record, 863), a farmer fifty-seven years of age, living in Graham County, North Carolina, and who lives a short distance east of the land in dispute and has lived there for twenty-three years, says that ever since he has lived in that country he has heard that the State line ran up the Fodder Stack lead, and that it has only been claimed in the last fifteen years that the line ran over Hangover Ridge. He says that he heard Williams and Hoyt say that they ran up and back on the Hangover Ridge and if there was any State line trees on that ridge it was a sourwood, but said that they could not find any State line trees.

J. S. MARONEY'S TESTIMONY.

J. S. Maroney (record, 867), who lived at Murphy, North Carolina for fifty-eight years, says that he knew one Robert Ballou well; that the witness went with an Englishman to examine minerals and went to Ballou's house in Tennessee and he thinks to Harrison's house also, and then that they all went up Slick Rock Creek. This was about the commencement of the war. But after getting to Slick Rock, they went around by Little Fodder Stack Ridge and Big Fodder Stack, and looked at the property, which they pronounced valuable. Harrison, who went with them, was the one who claimed the land. They were citizens of Tennessee but say that the property lay in North Carolina, and as under the North Carolina

Laws they could not enter the lands, they wanted the witness' father or some one else to enter the lands in his name.

SAMUEL HENRY'S TESTIMONY.

Samuel Henry (record, 867), seventy-eight years of age, who had been living in Murphy, North Carolina, for fifty-five years, says that the witness entered some lands on Slick Rock Creek about 1870 for Ballew and somebody else, and the reason was that Ballew as a Tennesseean could not enter the lands.

J. W. PATTEN'S TESTIMONY.

Dr. J. W. Patten, who had resided in Murphy, North Carolina since October 30, 1849, and was sixty-nine years of age, said that he knew old man Thomas Tatham, who was one of the party when the Commissioners ran the line in 1821; that he has been dead for twenty years and that the witness also knew William Graves, who was also one of the same party, and that he is also dead; and that they both told him that the Commissioners ran up Slick Rock Creek to the fork of the creek (record, 868), crossed the west fork and struck the point of a ridge that ran down into the fork of the creek, and ran up that ridge to the divide that ran up to Big Fodder Stack and over the Fodder Stack on the main divide to Haw Knob. Thence up the Haw Knob Mountain to Laurel Top and down the Laurel Top to the divide between Snowbird and Tellico, and ran the line some distance and marked it on that divide. That they then saw that they were going too far south and to keep the trend of the mountain, turned and went back and took a ridge from Laurel Top that ran westerly to Tellico River, crossed the river at a short distance from the river marked a holly tree on one side Tenn. and on the other side N. C. and from there on to Beaver Dam Bald and on to Unaka Gap and then turned south and ran to the Hiwassee River and from there to the Georgia line.

On page 869, this gentleman said he became interested by reason of the fact that his father in law had entered two tracts of land in 1854 on the head of Little Slick Rock. In 1867 this had not been paid for, "and he told me that if I would

pay what was due on them he would give them to me," and that was how I came to talk to old man Graves.

In reference to the Slick Rock part, he says he followed the line to near the head of Little Slick Rock and tried to trace it on to the Little Fodder Stack, and could not do it, and then went back and found the marked line leading down the ridge between two forks of Slick Rock Creek. That they went on following the line down the ridge to the foot where the forks of the creek came together at a distance of four or five miles from the Tennessee River. Then they crossed the prongs of Slick Rock and found an old line leading down the creek just outside of the Laurel as near the creek as they could get along and traced it down the creek that way to the creek's mouth and found a large pine tree marked. The marks were not very distinct but we were satisfied that they were old marks. In consequence of that tracing, the witness abandoned making that entry because only a portion of it was east of that line.

JAMES McDANIEL'S TESTIMONY.

James McDaniel (record, 894), seventy years of age, who lived about four miles from Murphy, North Carolina, and had lived in that neighborhood over sixty years, says that he knew William Allen and William Graves, both of whom were dead. That he lived about two miles from Allen's house and three-quarters of a mile from Graves. That Graves told him that they were along with the Commissioners in 1821 and that the Commissioners had run up the river to Slick Rock Creek to the forks of the creek, then up a ridge between the forks of the creek to the top of the mountain and the main lead and then along the main lead of the mountain.

JOHN DOCKERY'S TESTIMONY.

John Dockery (record, 872), who is sixty-two years of age, and had lived for fifty-two years in Cherokee County, says that he knew both Allen and Graves who were among the Commissioners in 1821. That old man Graves had told him about the line down at Tellico River but nothing about the Slick Rock line; but Allen told him that the line ran up

Slick Rock Creek and that that was the general understanding and reputation. That John Debity told him that the line ran up Slick Rock Creek. That he had never heard any portion of the ridge called Unaka or Unicoy until they got to the Beaver Dam Bald.

M. L. BRITTAIN'S TESTIMONY.

M. L. Brittain (record, 876), then living at Murphy, North Carolina, but from 1851 to 1855 was living near Robinsville in Graham County, says he had entered a quantity of lands near Slick Rock and was there with Mr. Piercey (J. W. C. Piercey, county surveyor of Cherokee County, who told him that the line ran up Slick Rock Creek and that that was the general reputation and that Unaka Mountain commenced at Beaver Dam Bald.

JAMES WHITAKER'S TESTIMONY.

James Whitaker, who lived near Andrews in Cherokee County, since 1873 (record, 877), and in 1898, when he gave his deposition, was ninety-four years old, says that he knew David Taylor from 1837 until he died in about 1877, who lived near Andrews. That David Taylor told him he was one of the party with the commissioners and that Slick Rock Creek was the line.

W. P. JONES' TESTIMONY.

W. P. Jones (record, 878), aged sixty-five years, who lived near Murphy, says that the general reputation was that Slick Rock Creek was the line. That he had many times carried a chain for J. W. C. Piercey, the county surveyor, who said that that was the line, and this witness says that Unaka Mountain was only so called from the Unaka Turnpike to Beaver Dam Bald.

W. P. PHILLIPS' TESTIMONY. (Record, 879.)

W. P. Phillips, who lives in Andrews, North Carolina, says that he knew John Debity and that Debity told him the

State line ran up Slick Rock Creek, and pointing to it, said the line ran up the line to Fork Ridge and that Fork Ridge was the line running up to Big Fodder Stack, and that Debity was then living on the east side of the creek in North Carolina, as he said.

STEPHEN WHITAKER'S TESTIMONY.

Stephen Whitaker (record, 881), residing at Andrews, North Carolina, eighty-four years of age, says that he had known Tatham who was with the Commissioners, and that Tatham had told him the line ran up Slick Rock Creek and that they all got drunk and ran a straight line to Georgia and lost Dicktown, North Carolina, and that Piercey had confirmed this.

C. C. JONES' TESTIMONY.

C. C. Jones (record, 882), who was sixty years old and living at Citico, Monroe County, Tennessee, says that he knew well one Thomas Hensley, who is now dead, and that Hensley told him that he was with the party who ran the east line of Ocoee Land District, and that Slick Rock Creek was the east line of Ocoee Land District because it was the State line. The general understanding was that Slick Rock was the State line. That he knew Debity and that the general understanding was that Debity lived in North Carolina and that Debity ran across the line to avoid arrest.

R. B. MASHBURN'S TESTIMONY.

R. B. Mashburn (record, 886), sixty-four years of age, who lives in Moore County, Tennessee, states that the State line between Tennessee and North Carolina runs up Slick Rock Creek to a spur, thence up to the top of the mountain just beyond Big Fodder Stack, cornered there and ran along Big Fodder Stack to the junction. When asked how he knew, said his father told him he was with the Commissioners in 1821. He said they had camped many times on Slick Rock Creek and that he had hunted in that neighborhood, and he could not say how many times when they had crossed the creek his father would say, "Son, we are in North Caro-

lina now." He showed me some of the marked trees. One was near an old Indian trail; the Tellassee trail; that he knew the State line marks; that his father died in 1848. The witness further says that his father in law, Clinton Hudson, who lived in Cherokee County, North Carolina, three or four miles from Slick Rock Creek, right under the Hangover, told him the line ran up the Slick Rock Creek. The witness says that he found State line trees up the spur and that he saw these in 1854, and that he, in company with others, was looking for the State line to locate copper lands. That he found several trees on the spur running from the head of Slick Rock to the Big Fodder Stack, which were State line trees and were marked as such and that was the general understanding, that Slick Rock was the line. On pages 891 and 892, he gives the names of several old men then dead, who had stated that Slick Rock Creek was the line and that the so-called Hangover Ridge was not called Hangover until after you leave Hangover Peak. That of the people who had told him of Slick Rock Creek, some of them were interested with him in the copper lands and some were not.

W. P. CHAMBERS' TESTIMONY.

W. P. Chambers (record, 551), a Tennessee surveyor, whose evidence will come up again with reference to the survey of the line, for eight years was a surveyor of Monroe County, Tennessee, says that Jack Milligan told him where the State line was and that he himself was running a survey for a Mr. Albright and they stopped at Milligan's house, and that Milligan asked him what they were doing there. That Mr. Albright told him they were running the State line, and Milligan said, "The line runs up Slick Rock Creek and you can't move it." He seemed to be mad because they were trying to move the State line.

JAMES CRISP'S TESTIMONY.

James Crisp (record, 562). This gentleman was also a surveyor, and says he was told by Peary Johnson and one Calloway that the line ran up Slick Rock.

DEFENDANT'S WITNESSES ON TRADITION.

The defendant produced the following witnesses on the subject of tradition, to wit:

JAMES L. NELSON. (Record, 937.)

He says on page 938 that he was told by one William H. Thomas, who had entered two tracts of land beginning on the State line near the mouth of Slick Rock Creek, and that he wrote to this witness to get Piercey, the county surveyor, to survey them. That Frank Cooper told the witness that these surveyors made a corner tree on a spruce pine and ran right up to the Slick Rock Gap and to that ridge, and that Thomas told him that that ridge with the Hangover ridge was the State line, and to tell Piercey not to cross that line for that was Tennessee.

PLEAS HENRY. (Record, 949.)

He says that he was always told that the State line ran up over the Hangover Ridge or lead; that he was told so by Jack Milligan and Atlas Crowder, who were citizens living in that neighborhood, but old man Crowder lived between Big Fodder Stack and Little Fodder Stack. That Milligan lived on Tellassee Creek about a mile from the Little Tennessee River, right where you turn to go up the mountain toward Little Fodder Stack. That these informants were each about sixty years of age when he heard this. That they are both dead. On page 951, that Dave Orr, who is living and was one of the complainant's witnesses, told this witness that the State line ran just below his mill straight west to Hangover, and that people between Slick Rock and Hangover voted in Tennessee.

MILTON WILLIAMS. (Record, 964.)

He says on page 965 that he has always considered the Hangover Ridge as the State line and never heard it disputed until this trouble came up, and that two old men, his grandfather Ben Johnson, and Mack Carr and one Deaver

and William Williams, all told him the same thing. But, on page 968, says he never heard it talked about as being at Slick Rock Creek until this dispute came up about eighteen years ago. On page 969, when pressed on cross-examination, he said he never heard William Williams speak about it but that was the understanding anyway.

OXLEY WILLIAMS. (Record, 971.)

When asked on page 973 what he had heard old people say, answered the question 32, "I have heard different tales but of no benefit to either one, some tell one thing and some tell another."

WILLIAM R. CARRINGER. (Record, 981.)

States on page 982 that his father had told him that the line was on Hangover. When asked if he had ever heard any other person say so, he answered question 16, "I don't recollect. I have heard it all my life off and on but I don't recollect who I heard speak of it. It seems that ever since I recollect that the Slick Rock Gap line was spoken of and up by Hangover, but I don't recollect. My recollection is I heard it spoken of many times, but I don't know who it was. I cannot think of anybody who spoke of it except my father, he showed me, we were just traveling over, and he told me 'here is the line between North Carolina and Tennessee,' but I remember that it was the general understanding that the line was there."

H. H. MILLER. (Record, 983.)

H. H. Miller, living in Monroe County, Tennessee, says his uncle Joe Graves told him that he was with the surveyors in 1821. He further told him that they went on the State Ridge to Tellico River. It was foggy and they found they had made a mistake. That the next morning they sent Graves and another man back to cut out the backs and they got onto a high peak and just made a plat, but never went back and surveyed around the headwaters of Tellico; and he says that the State Ridge was so called on account of its hav-

ing been thus surveyed. He says, "I asked him (Joseph Graves), why they called it State Ridge, and he told me." Joseph Graves is dead. He further says that without surveying, they simply made a plat around the high ridge and went on. That also an old man by the name of Tate told him how it came to be called the State Ridge. That it was the general understanding that State Ridge got its name from the mistake above mentioned, and that the real line was east of that ridge. On page 987, he says he was told that they did not survey the line east of State Ridge but just platted it. That with reference to cutting out the marks, he was told that they cut out a few and found that it was too much labor, and that it was unimportant and they quit and went back.

A. C. WILLIAMS. (Record, 991.)

On page 996, he states that when he was a boy thirty-five or forty years ago, remembered old people say that when you get to Slick Rock Gap that was as far as North Carolina went. On page 1,010 he says that Hangover Ridge comes in at the mouth of Slick Rock Creek and that he is sure of that. That the middle ridge, that is to the so-called ridge across from tree 29, does not come all the way to the river, but that the longer one goes to Slick Rock Creek. And again on page 1,016 that the main Hangover goes to Slick Rock Creek.

JOHN W. STRATTON. (Record, 1,029.)

This gentleman lives in Monroe County, Tennessee, and was eighty-three years of age. He says on page 1,031 that he had heard Levi Mashburn speak of the State line, and on page 1032, that he was told that when the Commissioners got on the top of Laurel Top, the fog came on thick and that they ran on and ran past the gap and down that State Ridge as they called it, until they got under the fog and saw they were wrong, and that they just stopped there and went right across to the top again, across the head of the stream there. And on page 1,033, that he had heard Piercey claim that the line ran around Tellico, and on 1,035, in reference to the upper contention, that he had heard his brother and others who

lived on the North Carolina side say that the line went over Hangover. His brother is dead. And that Hoyt, the surveyor, also told him the same thing.

On page 1038, on cross-examination, he says, that with reference to the conversation with Mashburn that the Commissioners did not survey but only platted the line around the head of Tellico. On 1039, that the Commissioners in running the State line found that they were wrong and crossed the stream and just let that loop alone. This story about the fog and the mistake of the Commissioners is corroborated by one Seymour, who is a lawyer in Knoxville (Record, 1034) and at page 1049 about not surveying but merely platting the mountains to the east of State Ridge and the calling of the ridge by that name, and also had heard Hoyt, on page 1,052 (on cross-examination), say the same thing. On page 1,052 on cross-examination he reiterates the statement that he was told they did not measure it around the mountain as claimed by Tennessee but only guessed at the line, and that if the report of the Commissioners is that they ran the line, measured it, marked it, and established mile posts at every mile, then what Graves told the witness flatly contradicts that report. This gentleman represented Stephenson in the Stephenson and Fain case.

On page 1,054, he says that old men in the neighborhood of the Tellico country always spoke of the line as running around the waters of Tellico and that his informants ridiculed the commissioners report.

JOHN H. HOWARD. (Record, 1,077.)

He says on page 1,078 that he knew Jack Milligan and had heard him say that the line ran over the top of Hangover. On page 1,080, when he was asked the occasion of this conversation, he answers, "I don't know that I can tell anything about it. I just crossed the river in a vessel and he and these parties were there talking and they were talking when I went up to them and I don't know what started the conversation." But he admits that he did not hear the whole conversation. On page 1,081, he says with reference to

Grant, one of complainant's witnesses, that he was an intelligent man of good memory and reliable, and so far as he knew, Milligan was not untruthful nor unintelligent enough to tell two different stories about the State line, and if Grant said he told a different story from the one reported by this witness, he would have no reason to doubt Grant's word.

JAMES FARR. (Record, 1,352.)

This witness testified in the Hebard case that he lived on the Fodder Stack Lead, east of Slick Rock Creek on the old cove; that he always understood that the line went over Hangover. That he had lived in the cove for ten years, that would make in from 1886.

EMERSON DEBITY. (Record, 1,353.)

Says he lived with his father on the land in dispute and voted in Tennessee, and it was always understood that the line ran over Hangover. Farr and Debity, the latter the father of this witness, had leases from the Beddings, which are claimants under North Carolina grants. These leases are attached to the deposition of Carver. (Record, 853 and 4.)

B. R. NICHOLS. (Record, 1,354.)

Lived on the disputed land about twelve years prior to 1896. Understood that the line was east of Slick Rock Creek.

A. D. CLINE. (Record, 1,354.)

He rented from Hebard and voted at Mulberry, Monroe County, Tennessee. Paid his taxes there and worked the road down in Monroe County.

JOHN DEBITY. (Record, 1,355.)

This witness lived at the fork of Slick Rock Creek at the left-hand prong about nine miles above the mouth of the creek. That he had always claimed that he was in Tennessee and that he once tried to vote in North Carolina but they would (not) let him unless he swore that he was in North

Carolina, which he would not do. That he understood the Hangover Lead to be the State line. On cross-examination, he denies the lease that is attached to Carver's deposition.

BOYD McMURRAY. (Record, 1,358.)

Says he was a farmer living in Monroe County, Tennessee, seventy-one years of age. Says that one Jack Milligan told him that the State line was over Hangover Lead and that the people who lived on the waters of the Slick Rock Creek voted and paid taxes and worked the public roads in Tennessee, and that one Heyt a surveyor, told him he had located the line on Hangover, but further told him that he had found marks up and down Slick Rock Creek, but that that was a bogus line.

T. E. H. McCROSKEY. (Record, 1,360.)

Testifies on page 1,861 as to the reason for locating the east line of the Ocoee Land District at the Slick Rock Creek as given by Brannum and T. G. Harvey, who were on the survey, was that the Hangover lead was the State line, but the surveyors when they got to Slick Rock Creek stopped there, because the lands east of the creek were very rough, and stopped because they were worn out and tired of the work.

We forbear to comment upon or compare the testimony for the respective parties until we attempt to sum up the case hereafter.

COMPLAINANT'S EXPERT TESTIMONY.

In the order of printing, the first expert witness called by the complainant was D. B. Burns (record, 226), at that time residing at Knoxville, Tennessee, who testified by way of qualification that he graduated at the Burnsville, W. Va., High School and in 1901 graduated at the University of West Virginia and took his degree, and thereafter was constantly engaged in surveying and woodcraft from the time he was nineteen years of age.

This witness was employed to survey and locate the State line in dispute. He commenced this survey in April, 1908,

and finished it in May, 1910. In April, 1908, he commenced northeast of the river where the State road crosses the Smoky Mountain about three and a half miles north of the Tennessee River, and surveyed from that point to the Unicoy Turnpike to the 101-mile post where it turned in a southerly course to the Georgia line, a distance of forty-two or forty-three miles. He surveyed with a transit, but says that the ordinary instrument used in these mountains when the lines were originally run was the compass. That the transit is the more accurate instrument; that with a compass you cannot hope to get accurate results, but with the transit it is possible to get almost accurate results.

He found a number of State line trees all the way from where he began along the Smoky Mountain down to the Tennessee River and up Slick Rock Creek to Big Fodder Stack and from the Big Fodder Stack to the junction along the main mountains and also toward Jenks Knob, and from there to the end of the Unicoy Turnpike at the 101-mile post, along the mountain. That wherever they found good timber he found marks just the same as along the undisputed part of the State line. That he knew these were State line marks because a person who has been in the habit of tracing up old line marks can tell from their appearance. The State lines were on fore and aft trees, a blaze and two hacks, and on side line trees marked with three hacks. That you can tell from the tree about the age when the marks were cut through the bark. If the axe went into the wood you can block the tree and take out the block and count the number of growths which will give you the number of years since the mark was made.

He then explains what blocking trees means. At the commencement of his surveying he took an observation on the North Star in order to determine the true meridian north and south, and says that by running an accurate line and estimating the angle between the lines, by back sights and front sights you will be able to calculate the course of each particular one. That after surveying about six miles, he took another observation of the North Star and obtained the true north and south meridian, and checked his work by the vari-

ous angles from his first observation, continued his survey to the junction of Hangover lead and Big Fodder Stack and took another observation at that point and found that his calculations checked with each other, and that that was a check on the entire work.

He says it is possible to count all angles even from the observation and count the true bearing of the line, but by taking a number of observations, it would tell you whether you had made an error in taking angles. That he checked his work from the State Road on the Smoky Mountain to the junction in three different places and was perfectly satisfied that his work was correct. That about a year afterwards, he surveyed another line, an accurate transit line, from the junction over Stratton Bald down the main ridge to Cheoah River and down Cheoah River to Slick Rock Creek and tied into the line that he had run the preceding year and found in the entire circuit practically no error at all. That this last involved about twenty-five miles.

He then produced a plat representing a survey of the State line, showing the Tennessee contention and the North Carolina contention. That in making this plat he ran a base line down to the Cheoah River and likewise to the Tennessee River and likewise to the other streams. That he surveyed Slick Rock Creek for about five miles up the stream, and the rest of it is sketched in from side notes on the field. At Tellico River he only surveyed that stream where the line crossed it. He also surveyed Cheoah River and then on his plat drew a system of coordinates, the north, south, east and west at a distance of five thousand feet and says that if you follow the coordinate system it is impossible to make an error that you cannot detect. He explains that a fore and aft tree is marked on both sides the way the line enters and the way it leaves, and the side line is marked pointing in the direction within which the line runs. A side line tree is not supposed to be on the line but near the line.

On page 232 he states that the tree marks indicate to you the direction in which the surveyor is going. The map that this witness filed, which we will come to later, introduced as Exhibit "D" to this witness' testimony, facing page 336 of

the record, and contains a list by number of the trees between the beginning of his survey and the 101-mile post, consisting of 124 trees, and this will explain the significance of the number mentioned in his answer on page 233, when he says, "This block No. 1, which shows a State line mark, is in evidence, was taken from tree No. 13, a white oak." On page 251, he says that he took the Commissioners map of 1821 and went to a point on the north side of the river opposite the mouth of Slick Rock Creek at an elevation of four or five hundred feet above the mouth of the creek, from which point he had a splendid view of the Slick Rock Basin including the principal peaks, and observed that that map for a distance of six or seven miles indicated by the mile circles, showed a practically straight course to the first decided break to the left. He determined the general bearing of that portion from the meridian shown on the plat. He took his instrument opposite to the mouth of Slick Rock Creek, set it up on the same bearing taken from the original map, and found that the bearing took him right over Big Fodder Stack. He adds that at the time he went there, he was led to believe from prior investigations made by C. Z. Denton, that the line went over Little Fodder Stack; and he expected the line to go over Little Fodder Stack, but that after using the compass for that test, he found that it went over Big Fodder Stack. He then abandoned the idea that the line could have gone in any other direction than up Slick Rock Creek and over Big Fodder Stack.

He then began his investigation for marked trees. The line northeast of the river trends southwest. Going down the line, he found near the bank of the Tennessee River a hemlock, commonly called a spruce pine, a fore and aft tree, one side of which had been blocked, which he designates on his map as tree No. 29, and for brevity we will hereinafter allude to that point as tree No. 29. The trees that he found on the north side of the river all had the same appearance as to age.

He followed down the Tennessee River about half a mile to a point opposite the mouth of Slick Rock Creek, crossed the river at the mouth of Slick Rock Creek and continued to

survey up the Slick Rock basin, surveying up that creek 4.30 miles, finding a number of marked trees. He then continued the survey up Slick Rock Creek to Big Fodder Stack lead and found a number of marked trees and blocked one of them, a fore and aft tree. This was tree No. 11, and block No. 4 is in evidence. On surveying up this creek about five miles he came to a ridge leading up the Big Fodder Stack lead. That up this ridge it looked like the timber had been burned and a great deal of the large timber had been destroyed and that the balance was not of such character as to show the original marks, but he found some marked trees leading up that ridge to Big Fodder Stack some of which had been blocked. Tree 49 had been formerly blocked. Tree 47 he blocked and that block No. 7 is in evidence. That these trees all bore the same kind of marks as to age as those trees he found north of the river on the undisputed line. After reaching the junction and proceeding, he found twenty-six State line trees, all of which are designated on the map, and to this number Mr. Gamer, another of complainant's witnesses, added some when he made his (Gamer's) survey.

Burns says he blocked two or three of these trees; one between Big Fodder Stack and Rock Stack, and another under what is called Chestnut Knob. That he only had one of these blocks there taken from the tree near Chestnut Knob, which he introduced in evidence as block No. 9, tree 78.

In April, 1909, he continued his survey from the junction to Laurel Top and found marked, both fore and aft and side line trees, on that part of the line, all of which appeared exactly the same as undoubted State line trees that he had found. That between the junction and Laurel Top there is no dispute about the line. That from Laurel Top after making two attempts, he continued his survey to Jenks Knob; from Laurel Top to the point called County Corners he found no State line trees, but the timber on that ridge was very poor, and that no timber along there would show the State line marks now, although this part of the line is undisputed. From County Corners he continued in a southwestward direction down to what is called the State Ridge, that is the ridge upon which the State of North Carolina contends that

the State line runs. These principal points mentioned are designated in the exhibits already mentioned.

In going down the ridge to Tellico he found a number of trees, State line trees, eight of which had been blocked. He continued to Tellico River and crossed it and found tree 107, which is marked 86 miles on the right hand as you go to Jenks Knob. Across the Tellico River Jenks Ridge commences. The 86-mile tree is about a thousand feet from the Tellico River on the ridge. Between County Corners and Jenks Knob eighteen State line trees were found. State Ridge tallies with the map of 1821.

In May he went with Mr. Gannet, one of complainant's witnesses, to the 101-mile post, where the Unicoy Road crosses the State line, and they ran a joint survey of the line from that point along the main divide to Jenks Knob and tied to the line that this witness had previously run in March. Together they did a little extra work at the 101-mile post, where the Unicoy Road crosses the mountain as indicated by the plat of 1821, and runs in a southerly course to the Georgia line, and they made the investigation to find that line. They found marks, one fore and aft tree, which they blocked, and that block is in evidence, block No. 10, tree 121.

The purpose in making that investigation was to determine at what point they turned south. That the point called the 101-mile post was shown on their map. This block No. 10 shows marks precisely like those State line marks found on undisputed portions of the line. He then goes into the details of the survey from the junction back over Hangover. That although he made a careful survey and search for State line trees over the Hangover lead, he found none. He then describes the ridges that run off from the so-called Hangover, one of which runs to the Cheoah River and strikes it about five miles from its mouth, which is really a more prominent ridge than the Hangover. There is also a ridge that runs down from Hangover to the mouth of Slick Rock Creek. He then describes the sourwood tree that Hale, one of defendant's witnesses, found, and Hale claims that it is a State line tree on Hangover. He goes into some details about the character of the marks and the number of the

marks on this tree and gives this opinion: "As a surveyor, I think, in fact I know, that it never had any State line marks on it." This tree was decayed on the inside, as will appear from the evidence and testimony as we go along, and it was impossible for that reason alone to determine that it was a State line tree. This witness continues that there was good timber there sufficient to have retained marks if they had been made in 1821.

Mr. Burns continues that Mr. Gannet in making his survey, started at the 59th-mile tree, back of where this witness commenced and surveyed about 2 1-2 miles more than this witness did, but furnished Mr. Burns with a copy of his notes. Exhibit "D," is the joint work of Messrs. Burns and Gannet, and was made from a combination survey. That from these combined notes, the line from the 59-mile tree to the Tennessee River opposite the mouth of Slick Rock Creek is exactly 6.02 miles. That by the Tennessee contention, which crosses the river straight from tree 29 to Hangover Ridge, the distance to the river is only 5.47 miles. The south side of the river from the Tennessee River to the junction by Slick Rock Creek and the Fodder Stack Range is 10 miles, and that by the report of 1821 of the commissioners, the distance is 16 miles, whereas the Tennessee contention is that it is only 14. From the 59th-mile tree, bearing on Burns' map, is S. 55 degrees, 5 minutes west. On the Commissioners' map it is S. 58 degrees west, and to the first sharp turn to the left from the 59th-mile tree to Fodder Stack is by Burns' map south 49 degrees 41 minutes west; by the Commissioners' map 50 degrees and 40 minutes west, while the Hangover is south 29 degrees 8 minutes west. From the south bank of the Tennessee at the mouth of Slick Rock to the Fodder Stack is south 44 deg. 28 minutes west, and by the Commissioners' map south 43 deg. 25 minutes west. That a similar bearing on the ground from the south bank of the river to Hangover is south 9 deg. 39 minutes west. This witness states that he could find Big Fodder Stack on the plat of 1821, that Hangover does not tally with the plat of 1821; instead of breaking to the left it breaks to the right. From the Tennessee River, Big Fodder Stack is 6.67 miles.

On the Tennessee contention it is 5.9 miles from the south bank of the river to Hangover. That the distances from that first decided break to the left is 3.3 miles while the distance from Hangover to the junction is 2.59 miles and that the map of 1821 shows the distance between Fodder Stack and the junction is 3 1-3 miles, and the junction, according to Burns' map is 18 deg. 12 minutes east. The plat of 1821 shows the same course south 19 deg. 15 minutes east, while the course from Hangover to Junction is south 60 deg. west.

This witness made a survey from Jenks Knob to County Corners, around by McDaniel Bald, which is on the line contended for at the Tellico District by the State of Tennessee. That there was good timber but no State line marks whatever, and this is corroborated by all of the witnesses on both sides. That the distance around that way is 11.31 miles, while by the State Ridge between the same points it is five miles and in that five miles there are eighteen State line trees.

The North Carolina contention corresponds with the 1821 map. From County Corners to McDaniel Bald on the Tennessee contention, the course is south 20 deg. 30 minutes east, while the plat of 1821 shows a course south 54 deg. 45 minutes west for that same distance. From Jenks Knob to Rocky Knob is north 45 deg. 55 minutes west. That the nearest distance north from Cold Spring Gap to the State line ridge is 3.3 miles, so that according to that calculation there will be one point on the Tennessee contention three miles distant from where the plat of 1821 shows it to be at that place, and where the marked line also shows it.

Exhibit "H" is a comparison map of the contentions of the State of Tennessee with the line run by the Commissioners. Exhibit "C" facing page 252 is this witness' plat of the two contentions.

The witness goes on to say that his plat shows the distance from the 59th-mile tree to the 86th mile tree at 27.64 miles. That running to that tree by the Tennessee contention to the junction and then along the line down State Ridge it would be 25.56 miles. That going around Tellico, as the State of Tennessee contends, you would come out on the undisputed

line about a mile or a mile and a half from the 86th-mile tree, plainly marked. That from the 59th-mile tree to Jenks Knob in the North Carolina contention, is 28.77 miles. By the Tennessee contention 32.86 miles. By the map of 1821 it is 28.01 miles.

This witness surveyed the Tennessee River for about twenty-eight miles and states that the Cheoah River enters the Tennessee at an angle of about 80 deg., at the mouth about 30 deg. That Slick Rock Creek makes about a right angle to the Tennessee River. That the Cheoah River for ten or twelve miles is almost at right angles to the undisputed line. That the plat shows that the line followed the creek. Right opposite tree No. 29 there is a bluff on the south side of the Tennessee River 700 feet high and extending for about half a mile down towards Slick Rock Creek and up towards Cheoah River and that there is no ridge extending to the Tennessee River just opposite tree No. 29.

On page 255, this witness gives the numbers of the trees that were located by him, and on that Exhibit "D" there is also a table of comparison of distances. This map Exhibit "D" faces page 256. The witness further says Hangover Ridge is comparatively low until you get pretty close to Hangover. There are three gaps, Slick Rock Gap, Big Fat Gap, and Sourwood Gap. That the ridge rises rapidly from Big Fat Gap, the last low place. Hangover Peak is over five thousand feet high, and that the Big Fodder Stack Range to Junction is very high and is the main mountain in that locality. That Rock Stack and Chestnut Knob are prominent peaks. That Slick Rock Creek has a considerable fall from Big Fodder Stack head, goes through a gorge and on either side there are steep mountains. The Little Fodder Stack rises more rapidly and is higher than the Hangover Ridge for the first three or four miles. From a point north of the river it look easy to get up Slick Rock Creek. From the general appearance of the territory, by viewing it from the highest peaks on the north side of the river, one can readily see that the main mountain goes to the right of Slick Rock Creek. It has greater continuity. That he made a test of

the map and survey of 1821, comparing it with his survey and the result was surprisingly accurate. He made a test of the plat of 1821 by taking some undisputed point on the line, for instance, the Tennessee River, using that as a base, drew a line to the first decided break in the general direction of the map, compared them with the general bearings in his own survey and found that the result was surprisingly accurate. That the map of 1821 does not purport to be an accurate map topographically, but only the line itself; adjacent territory was just sketched in. He then takes the wording of the Commissioners' report, "a true and accurate plat of the dividing line between the said States as settled, run and marked by us," and states that he found it be that according to the undisputed portion and according to the North Carolina contention. That this map was made on a very small scale, but that witness got surprisingly close tests that he put it to in every way, that went right over the original marks. The scale of this map is 800 poles to the inch, 2 1-2 miles. But that map shows the river to be one-half mile wide, whereas it is not over 300 feet.

He then explains why it is that that map apparently shows that the State line only went up the creek for a mile and a half, and attributes it to an error in platting the creek. There is no stream where Tennessee contends the line crosses the river. In following up Hangover, the first stream you would strike would be Hiwassee, 37 or 38 miles from the Tennessee River. That the Tellico River is 40 feet wide. That the name "State Ridge" seemed to be in general use and the name was apparently given to it because the State line ran on it. That his survey corresponded with the map of 1821 as far as he made the survey. There are two mile circles on that map of 1821 very close together at the 38th mile, which this witness (and it is corroborated by other witnesses on both sides) is of the opinion stands for the same mile circle at a point where two portions of the map of 1821 were pasted together. The trail at the 93d mile mentioned in the report of the commissioners comes out just right.

Facing page 264 is a copy of the map of 1821 used by this

witness. This witness tested the map of 1821 at the first mile tree by getting the bearings from the 59th-mile tree to the 101-mile tree, by the original plat of the commissioners and also by the actual bearing given by the witness' survey, and there was only a difference between the two of five minutes. He then proceeds to give the true location of the line as is claimed by North Carolina and explains why Fodder Stack Range would be selected. He says in coming down the Smoky Mountain to the Tennessee River, the Big Fodder Stack is almost a direct line. The Slick Rock Basin looks like it is very easy to get up and he thinks that Big Fodder Stack would have been selected from a point back on the Smoky Mountain, and after getting to Laurel Top the ridge known as State Ridge has every appearance of being the main top of the mountain, and that the marked trees would take a surveyor over the line exactly as shown by the plat of 1821, and this witness' survey, Exhibit "D."

On cross-examination, p. 267, this witness says: "I did not survey from Slick Rock up to the main ridge." "But there might be some doubt after one got to the junction in ascertaining which would be the main mountain." The highest peak at that particular point is Stratton Bald and at the junction the Hangover is from three to five hundred feet higher than Fodder Stack. Stratton Bald and Hayo are about the same elevation and in going along from there down to Chocah River the elevation of the ridge keeps pretty well up. That from Cold Spring Knob it begins to fall until you get to the Tennessee River.

This witness surveyed his line by a transit instrument, and on page 271 explains that from the dates upon the map of 1821 he knows that the commissioners must have been hurried in their examination and notation of the line, and says, "As a matter of fact, in following along the ridge, they did not show, or did not attempt to show every nook and turn in the ridges. They sighted from the highest point, sometimes it would be a mile, and sometimes not so far; but in chaining and marking they did actually follow around the ridge, and in their platting they showed the distance from one high point to another high point straight, but they actually meas-

ured around and adopted the line upon the top of the ridges along which they marked, also the marked trees can be found now."

That in locating the line north of the river, they followed the top of the ridge. The map of 1821 from about where the 64th-mile tree would be, shows a straight line to the mouth of Slick Rock Creek. On the south side they apparently followed the creek about a mile and a half. That in examining for trees along the north side of the river, from the tree 29 to the mouth of Slick Rock he, Burns, went along there hurriedly and did not find the tree that was subsequently found by Mr. Gannet marked tree No. 30. That block No. 3 was taken out by Denton, but he was satisfied that it came out of the tree designated. That on the spur leading up to Big Fodder Stack he found no trees. That it is about four miles from Big Fat Gap to the river and about three and a half miles to Cold Springs Knob. Huckleberry Knob from Haw Knob and Laurel Top is the highest point of all. That it is not on the State line as claimed by either party. Citico Creek is entirely on the Tennessee side. The Commissioners of 1821 mention the west prong of Tellico. From Stratton Meadows to State Ridge is three miles. Further along he says, "The plat is one thing and the topography is another. The plat within itself is remarkably accurate, and if you undertake to follow the plat from any known point, it would take you across the Tellico River, but the topography is sketched on the map and does not show the line crossing the Tellico River."

The Wah-chee-see Trail strikes the line at 96 miles. Jenks Ridge runs from Jenks Knob towards Tellico. On Jenks Ridge there are three State line trees, which are described as 105, 106 and 107. Trees 106 and 107 are close together.

Reexamination.

Surveyors in rough survey always sight from one high point to another, but in measuring, follow the meanders. The straight line on the plat of 1821 from the 64th-mile tree would go over very rough country. The line they marked is the one they adopted. It is impossible to cross the river

at the No. 29 tree. A straight mile from the 64th-mile tree on the map of 1821 carries you very close to the mouth of Slick Rock Creek. That line is south 75 deg. 30 minutes west to the river; as the State of Tennessee contends from the same point is south 53 deg. 45 minutes west. Tree 29 is about twenty feet from the river and the line points to the bank of the river and not twenty feet back as marked as approaching the river.

In searching from tree 29 towards the mouth of the Slick Rock Creek on the north side of the river the witness found a tree that had a very strong resemblance to the original State line marks. That the error in sketching the creek on the map of 1821 makes the hachures, the etchings come too early. That the copies of the map of 1821 all seemed to differ. That the water divides do not correspond with the highest ridge and have nothing to do with the line. Taking the map of 1821 and starting at an undisputed point, it could not be possible to go around Tellico, nor by way of Hangover Ridge. The North Carolina contention is the only one that fits.

The report of the commissioners mentions the west fork of Tellico River, but the map does not show it. Whatever slight differences there are between the plat of 1821 and the marked line, which he found on the ground, would in no way help support the contention of Tennessee.

This evidence of Burns heretofore given was taken for use on the bill of review in the Hebard case, was adopted by a stipulation to this case, and was taken after the discovery of the map of 1821, but before the discovery of the Davenport field notes. This same witness on further cross-examination by General Cates on behalf of the defendant, testified among other things, that he first supposed after seeing that map that the line went up the creek a mile and a half and then up Little Fodder Stack. That when he went out, he received no instructions except to try and find the true line. That he very shortly, after viewing the country and seeing the map, determined that it could not go up Little Fodder Stack, but that it must run up Slick Rock Creek and the Big Fodder Stack.

As he came down on the north side of the river, the line from the northeast was making right for the Big Fodder Stack, and the map showed that it crossed at some stream and that it was Slick Rock Creek. That in order to follow the map it was necessary to follow that course. That for two or three miles the State Ridge is the highest ridge down in the Tellico Country.

On page 304 the witness gives certain elevations from the Government surveys and states that County Corners is one-half mile from Laurel Top and from Laurel Top to Grassy Point is one mile. That he found some of the State line trees had been remarked in about 1853.

He again describes what the State line marks are and identifies State line trees, and states that he was raised in the woods and was familiar with old line trees and that he has the blocks used in the Hebard case. He describes again his sighting from the north side and his taking his instrument to a point opposite the mouth of Slick Rock Creek. That he has every reason to believe that this State line was run with a magnetic compass, which varies from time to time and at different localities. That he tested his survey where he crossed the Tennessee River to the top of Big Fodder Stack, and then compared that with the 1821 map, and that he could determine from that map whether the line went up Little Fodder Stack, Slick Rock Creek, or Hangover. That the line to Georgia, the end line of the whole survey, is not due south.

He again explains the method by which surveys of this kind are made, by sighting from one point to another, and measuring around the meanders.

On page 322 he explains the variations of the needle, and facing this page is a copy of the map made for the Hebard case, which is Exhibit "D" reduced.

By the map of 1821, Slick Rock Creek appears to be about 800 feet wide, whereas it is in fact 20 or 30 feet.

After explaining again what the State line marks are, he states that there are no such marks on the sourwood tree on Hangover Ridge.

Commencing on page 337, the witness gives the elevations

from the Government contour map on the different ridges, and continues that on pages 338 and 339. The distance from where the turnpike crosses Smoky Mountain to Hangover along the Tennessee contention is 8.53 miles, while along the North Carolina contention, the Big Fodder Stack is 10.27 miles. That the Big Fodder Stack coming north is the main ridge; that the State Ridge below in the Tellico Country is about the same elevation for two miles as the ridges around McDaniel Bald.

Speaking of tree, No. 30, he says that he found the original State line marks on it on the side up the river, a chestnut oak. That on the reduced copy of his Exhibit "A" used in the Hebard case the line from A to B is a test line. In reference to the straight line at the mouth of Slick Rock Creek at about the 64th mile tree, the witness says that he took the bearing of that line and found its intersection with the State line on the main ridge as surveyed by him, and that the surveyors must have taken a bearing from the mouth of Slick Rock Creek, which they recorded in their notes, and that the chainmen made their surveys from the mouth of Slick Rock Creek and when they platted it, straightened the distances out. That the straight line to Slick Rock Creek as actually measured is about 5,800 feet and it is 8,269 feet to Slick Rock by way of trees 29 and 30. That Little Fodder Stack is the main ridge and the others are only spurs.

On page 353 this witness says that he thinks that when the surveyors of 1821 reached the point on the Smoky Mountain where they could see the mouth of Slick Rock Creek (that is the point from which they took their bearing) they sketched in the streams instead of taking the courses and distances and showed the courses and distances on the map, and that he believes they just platted the distances and showed about straight, and that it is a matter of opinion, whether the line down by the trees 29 and 30 reaching the mouth of Slick Rock that way, or the straight line from tree 64 as they platted it, is the State line. That across from tree 29 there is just a steep mountain bluff.

On page 355, on redirect examination, this witness again states his experience as a surveyor. That the general course

of the map of 1821 took him up Slick Rock Creek and Big Fodder Stack. He says that he was handed this map of 1821 and asked to see if he could find the State line as originally run by the commissioners. That plat showed the Tennessee River on it; showed that it crossed the Tennessee River at the mouth of the stream marked "Creek," which he believed to be Slick Rock Creek. That he took the general course off of this map of 1821 from the mouth of this creek marked on it to the first decided angle that it made to the left a distance of six or seven miles from the river, and after having obtained that bearing from the meridian shown on the map, he set his compass opposite the mouth of Slick Rock Creek where he could get a good view of the high peaks and Slick Rock Basin and in that way tried to find out in what general course the Commissioners did run the State line after crossing the Tennessee River, and that he found after setting upon this bearing that it could not possibly reach the Little Fodder Stack as he had previously supposed it would; he then abandoned the idea that it could ever reach Little Fodder Stack and follow the plat. That he also found that it was impossible to go over Hangover and follow the plat. That he found that the general course of the plat took him up over Slick Rock Creek some distance, and then he found the trees up the spur leading to Big Fodder Stack and from there to the main ridge. That he was carried from his commencement point to the Tennessee River and thence to Slick Rock Creek by marks. He searched the trees and blocked some, and that the map of 1821 was a guide. That in following old maps, the rule is that where monuments can be found where there is no mistake as described in the deed, you must go to those monuments regardless of the courses and distances, whether the distances be longer or shorter, and that it would be ridiculous to expect to find everything on the ground just like the map.

That certified copies of the map of 1821 seem all to differ, that in the one used by Williams, the ridges and creek are not like the one he had and there is a difference in the path from the Valley Towns. That on the map of 1821 the width of all the streams was exaggerated and that Slick Rock Creek

is merely sketched in and wrongly and that it is exaggerated in width and length. That he believes that the Commissioners carefully measured up that creek or along the edge of it for about five miles, but it only shows on the plat that the line runs up to a mile and a quarter. That as they were going up along the line Slick Rock was the only stream on the right that they could see. That Slick Rock goes to the Tennessee at an angle of about 60 degrees; the Cheoah at about 30 degrees, and that Slick Rock corresponds at no point with Cheoah, which for seven or eight miles is north 45 degrees west; the Slick Rock for a mile and a quarter is north 30 or 35 degrees east. These courses are coming toward the Tennessee River. That the so-called straight line at the extreme south end of the map of 1821 is not due south, but is about 7 degrees out, but that it was so laid down as to enable the witness to find the true line, and on page 363 he explains why. One reason for it is that he thinks the map is pasted together in an accurate way; that that line is not in any disputed territory. That Rock Stack is the first high peak between Big Fodder Stack and the junction and about one-third of the distance.

In following up the waters of Slick Rock the witness says that that gave him the curve, a rough curve from the junction concave from the east, but that going up Hangover from the junction, the curve is in the opposite direction, the concave from the west and the former curve is the curve that was on the 1821 map, concave from the east. That the map of 1821 was a great advantage. There was a variation in the bearing in going from Tennessee River to Big Fodder Stack, and going to Hangover of 30 or 40 degrees, which he afterwards changed to 40 or 50. That the Hangover lead forks. That one fork goes down Slick Rock Creek and the other to Cheoah, but that just opposite tree 29 there is no ridge. That further along on the north side of the river after leaving tree No. 30, and about 150 feet further up the river he found a hemlock with State line marks on it. This is a tree other than No. 29 and is an extra one not on the witness's plat. That this tree was marked with a side line tree on the northeast side. That the hemlock just mentioned

was one-fourth of a mile below No. 29; that No. 29 is about one hundred feet from the bank of the river and that there are two trees marked with State line marks between tree 29 and a point opposite the mouth of Slick Rock Creek. That between the tree 29 and the creek a chestnut oak which he blocked is about 1,475 feet, and that he found that tree blocked on the east side and he blocked the western side, which is offered in evidence marked Block No. 11. That on this block he found more recent marks between the old marks and the marks made in 1853. That Gannet found this tree No. 30. That he—witness—searched on the straight line shown on the plat of 1821 from the 64th mile to Slick Rock Creek, but could find no marks, nor did he find any marks along the ridge which goes from the Hangover to the mouth of Slick Rock Creek. That the straight line of the map of 1821 from the 64th mile tree to the mouth of Slick Rock Creek runs over very rough country and that that straight line is a compromise between this ridge and the river bank. That the map of 1821 shows the State line striking the mouth of the creek, but as there was probably no tree standing in the middle of the creek, they marked a tree standing on the bank.

On page 376 he says that County Corners is recognized as the corner of three counties, Cherokee and Graham in North Carolina, and Monroe County in Tennessee. That everybody speaks of it in that way and that it has always been treated as the corner of Graham and Cherokee counties.

The witness made a careful survey of Jenks Ridge and State Ridge. That the map of 1821 is on the scale of 800 poles to an inch and it would be impossible to indicate every bend. 1/100th of an inch would be 132 feet and that a fair way to use such a plat would be to follow the general course. That Cheoah is a considerable stream with creeks running into it. It extends to Robbinsville in Graham County, and that Citico Creek is 30 to 35 miles long and that Slick Rock Creek and Citico head near each other. On page 383, the original map of 1821 was produced to the witness and upon notice given by the State of North Carolina to produce this map at the hearing before the Supreme Court of the United

States in this case, the State of Tennessee accepted that notice and agreed to produce that map. On page 391, the witness says that Citico Creek is on the opposite side of the mountain from Slick Rock. That the Hangover Ridge at Hayoe branches and separates into a number of different ridges; one leads to Cheoah and one to the mouth of Slick Rock, and one leads towards the river, and there are various spurs leading down between the different streams shown on the map between Bear Creek and Barker's Creek, etc.

On page 402, this witness explains the way in which he uses the term "traverse" and states further that the report of the Commissioners of 1821 in speaking of the old Trading Path leading from the Valley Towns to the Over Hill Towns, means that that is where the trail strikes the line, to wit, at the 93d mile. It leaves the mountain near the 96th mile, but that according to the Tennessee contention in the Tellico Country you will go six miles further to strike that trail.

The Davenport notes, (Record, 623) purport to be the notes of the original survey of 1821, discovered after the testimony passed on before, was taken. The authenticity of those notes was proven by the testimony of W. D. Jones (Record, 605) and Emma Harper Cilley (Record, 634). These notes were handed to D. B. Burns and other witnesses, and various witnesses have testified concerning them. Burns' testimony commences on Record, 643, and Exhibit "B B" complainant's exhibit, is a map made by this witness from these notes.

The straight line from the 64th to the 65th miles on the plat of 1821 is shown by these field notes to be south 75 degrees west, and the witness says that if you went to Cheoah you would have to go southeast and across from tree 29 would be south 30 degrees west, and that the Davenport field notes tally with the map of 1821 almost exactly. He says he found two differences; one of them is between the 71st and 72d mile, but at the creek finds that it tallies with Slick Rock Creek right along and that the Yellow Hammer Creek flows into the Cheoah River two thousand feet from its mouth. He then picks up each mile as surveyed by him and on the map of 1821, and upon these notes, and shows how closely

mark was a State line mark, but just beyond it he found undoubted State line marks.

On further cross-examination, page 687 of the record, states that he did not understand the etching of the 1821 map, and that the courses and distances on that map were the same as on the field notes and that there is no creek existing in that country at all as shown on the 1821 map and that the marked trees show the true line.

On pages 690 and 691, there is questioning with reference to a stone or maple marked "W. D. R. A." near the Hiwassee River, which it is insisted by complainant were the initials of the two surveyors who made the survey of 1821, to wit, Wm. Davenport and Robert Armstrong. The Davenport field notes by this tree was marked with certain initials; these initials complainant says are given by the field notes as "W. D. R. A.," while defendant insists that they are I X D. R. A. The witness, Burns, was examined in regard to this and first said that they looked like 6 X. D. R. A., but on a more careful examination of them he said that he was satisfied that they were W. D. R. A., and meant Wm. Davenport and Robert Armstrong, and that it was in accordance with certain of surveyors to mark such trees with their initials at times, and that this fact, confirmed his opinion, that the true reading of the field notes was W. D. R. A., because Wm. Davenport and Robert Armstrong were the surveyors in running this line between the States of North Carolina and Tennessee in 1824.

The next witness called by the complainant was

S. S. GANNET (Record, 408.)

This gentleman is in the employ of the United States Geological Survey and is engaged in topographical surveying. His position in that department is that of Geographer. He was educated in the schools of Augusta and Bath, Maine; Bowdoin College, Maine; and in the Massachusetts Institute of Technology at Boston, and received instructions in astronomy from Professor R. S. Woodward, present head of the Carnegie Institution in Washington, as well as a man of large practical experience in surveying lands in mountainous coun-

tries, and is thoroughly acquainted with woodcraft, and in 1882, 1883, 1884, 1885 and 1886 surveyed the Western North Carolina country.

In running the boundary line, he details his experiences, and on page 110 says, "I was detailed to the Indian Bureau of the Interior Department to locate the intersection of the 107th meridian with the Colorado-New Mexico boundary line by means of the marked line; and again in 1898 I was detailed to assist in the work of locating the boundary line between Montana and Idaho, starting where a certain Meridian crosses the Bitter Root Mountain, and established that by astronomical observations. In 1908 I was engaged throughout the season in remarking and re-tracing the boundary line between Idaho and Washington for a distance of about 120 miles."

On May 31, 1910, he was appointed by the Supreme Court of the United States as one of the three Commissioners to mark the boundary line between Maryland and West Virginia. That in his early years all of his work was mountain work, from Maine to North Georgia, and that he has been on all of the prominent mountains on the Alleghany and Appalachian ridges.

On page 111, he testifies how he became connected with this work. He says the Attorney General of North Carolina requested the Geological Survey to investigate the question pending between the States of North Carolina and Tennessee relative to the location of the boundary line between them and to find out if possible where the original line was run and marked, and that he was directed by the director of the Geological Survey to engineer the work. That he was to actually go on the ground and find out from his knowledge of the country and experience in such matters where the original line was actually run and marked. That it was his duty to find out the truth about where the lines run, regardless of whom it affected. That he entered upon this work in the latter part of April, 1910.

On page 112, he says:

> "I started from Murphy, North Carolina, and went first to the 101st mile post, where the Turnpike crosses

the Unicoy Mountain, and then I ran a line Southward. Mr. D. B. Burns was with me with some other men. Mr. Hugh Sadler, of Tennessee showed us where the 101st mile post was and he accompanied us down the line to aid in the identification of the line."

He said he investigated in the neighborhood of the 101st mile post to ascertain if it had been correctly located and ran a line southward and identified several trees and blocked one tree, which proved to be the original mark of 1821, as the growth of that tree was eighty-eight years. That the block produced by Mr. Burns is that one that he refers to. That he found one fore and aft and three side line trees.

He then ran a line Northeast of the 101st mile post, and found several marked trees and he identifies and says that he signed the map Exhibit "D." That he ran then along the undisputed line to Jenks Knob, having with him the map of 1821, and on the way to Jenks Knob found twelve State line trees. He surveyed on down Jenks Ridge and up State Ridge and found several State Line trees. He found twenty State Line trees between Jenks Knob and County Corners. From Jenks Knob to County Corners this witness made a survey independent of Burns, using the same instrument that he used in the survey of the line between Idaho and Washington and employed the exact methods approved by the United States Government. That as he came on to Jenks Knob and to County Corners he found that his survey tallied almost exactly with the map of 1821, and that by going around by McDaniel Bald it would not tally with that map at all.

That in making that survey the line crossed Tellico, that you cannot help it. That around by McDaniel Bald is twice as far as by the State Ridge line. That he did not go around by McDaniel Bald because it was obviously so far out of the way according to the map of 1821, and the marked line, that he decided that the line could not have gone that way. The line as marked agrees with the 1821 map. That he went along the Hangover lead and investigated every course for marked trees along that lead, and found no State Line marks, either from the Junction to Stratton Bald, or along Hang

over. Nor did he find any on the ridge from Hangover to Slick Rock Creek. That the sourwood tree was the only one that could by any stretch of the imagaination be called a State Line tree. This was on the Sourwood Gap. The tree was decayed inside and it was impossible to tell its age from the block and the marks and hacks were apparently put there promiscuously and were not State Line marks; it stood in an open space near a trail and a place that had evidently been used as a camping place.

That he went along Rock Stack to the Fodder Stack and down Fodder Stack lead to the forks of Slick Rock Creek. That from the junction down that way he found a number of trees well marked, apparently State Line marks, corresponding in age and appearance and other respects with the State Line trees on the undisputed portion of the State Line. That he went on to the Little Fodder Stack Lead sufficiently far to prove whether there were any State Line trees on that or not, and he found none. That in going down Fodder Stack Lead towards the forks of Slick Rock Creek he found a hemlock State Line tree, but further along the timber had been apparently burned, and just above the mouth of Slick Rock Creek he found several well marked trees and he identified eight trees above the forks of Slick Rock. These trees were marked with the same instrument; that he found twenty-six trees between the Junction and Big Fodder Stack; ten between Big Fodder Stack and the course of the ridge down to the creek, and from there to the mouth of the creek eleven trees; in all forty-seven trees, all of them State Line trees.

That the 1821 map carries you over Big Fodder Stack route to forks of Slick Rock Creek and thence to the mouth of Slick Rock Creek, and the marked line carries you over the same line.

On the other ridge between Stratton Bald and Hangover the timber is scrubby, but below Hangover the timber is good, suitable for marking in 1821. The timber is good at Sourwood Gap, and after careful examination, they found no marks that indicated that they were State Line marks on the

Hangover Ridge. There were one or two that were marked promiscuously. That from the mouth of Slick Rock Creek he crossed the river and followed the line along the Smoky Mountain to the 59th mile.

On page 418, he says with reference to the work of D. B. Burns, "I would say that I found his work certainly the most accurate of any work I ever had any dealings with; especially considering the fact that it was in such a rough country, I have never known work to be so accurate in such a rough country."

He went to where the wagon road crosses the Smoky Mountain, Burns' Station zero, and then followed the undisputed line Southwestwardly. The marked trees there were just like those that he found below. Coming down the line on that side of the river, the Big Fodder Stack seemed to be a very prominent land mark from near the 59th mile tree. Sighting along the line to the Tennessee River, Big Fodder Stack is the most prominent summit in the line. Surveyors coming down that way would most naturally select the Fodder Stack. You could see it a mile North, and their route would lead them directly toward it, and it would naturally direct the attention to Slick Rock Creek as the easiest way to reach it. And this coincides with the 1821 map. The other route was entirely too far to the left or East. He found the hemlock tree No. 29 near the river. Just across from there there is a very steep bank, almost inaccessible, 800 feet high, spread out up and down the river for three-quarters of a mile, which was not a practicable route, it was too steep. It was practically impossible to survey a line up and down that bluff.

Continuing down the river from Tree 29 on the north bank I found a Chestnut oak, a fore and aft tree, a State Line tree. Further down it was more rocky, and opposite Slick Rock Creek was a solid ledge. Fodder Stack averages higher than Hangover. The latter is more broken and has deep gaps in it.

That he ran up the ridge to Big Fodder Stack in a Southwest direction, just as is claimed by the State of North Carolina. The line was shown running up Slick Rock Creek by the Ocoee District map. The Slick Rock runs through a steep

gorge with steep bluffs on one side and then on the other. That it goes down a steep descent about 100 feet to the mile. The Fodder Stack is the leading ridge, of greater average altitude and continuity. Down the Little Fodder Stack the average is much greater than Hangover, which is more broken and has more deep gaps. The ridge around the head of Tellico has a greater average height than the State Ridge but is a good deal broken.

From County Corners the natural course would be along State Ridge. The main ridge really turns about at right angles to the east. The State Ridge is not so flat; more of a backbone and for some distance from County Corners State Ridge is higher. From Hangover to the junction the elevation is greater than to the Big Fodder Stack Junction. Complainant's Exhibit "E" was here offered.

The Government contour map shows the line on Slick Rock Ridge and Big Fodder Stack in a general southwest course and then a little east of south to the junction, the same as the North Carolina contention. At Tellico it supports the Tennessee contention.

He then speaks of the maps of this locality in the Congressional Library at Washington.

On the North this witness extended his survey as far as the 59th mile tree, and he says that our map Exhibit "D" corresponds exactly with data that he obtained on the ground, and the list of trees given were all on the North Carolina contention and none on the Tennessee contention. He then gives a list of the trees that he paid particular attention to and states that he found tree No. 30 and also No. 46, marked "N. C. 5 M." south of the river. That on Gannet and Burns' map from the 59th mile tree to the Tennessee River is 6.02 miles. On the map of 1821 it is six miles. This is to the mouth of Slick Rock Creek. By the Tennessee contention it is only five and one-half miles to the river. By the North Carolina contention the line corresponds with the 1821 map. To the Big Fodder Stack from the south line of the Tennessee River is 6.67 miles and from there to the Junction 3.3 miles, or 9.97 in all. And from the 59th mile tree to the Junction by our survey is 15.99 miles, and 16 miles by the

map of 1821. By the Hangover from the south bank of the Tennessee River to the junction is 8.51 miles, and from the 59th mile tree 13.98. That the stream marked creek on the map of 1821 cannot be anything else than Slick Rock Creek. The mouth of Cheoah is more than one and one-half miles to the east and could not possibly be the stream marked "creek." That Slick Rock is almost at right angles to the Tennessee River. Cheoah at a very acute angle. Cheoah runs southeast and the creek southwest. The map of 1821 is a map of a line, not of the general topography. That the topography was simply sketched in. That it would have taken months to have accurately mapped that country topographically at that time, and that Hale's map is very inaccurate, and he details the inaccuracies of that map. There were several ridges omitted, especially one leading from Big Fodder Stack to Slick Rock Creek, and it does not represent Slick Rock Creek accurately, nor the heights of Fodder Stack and Hangover. Also in other respects it is inaccurate.

That the first knob on the Fodder Stack is only a mile from the river, and that you have to go on Hangover three miles to reach that altitude on the ridge between Slick Rock and Bear Creek. That the first peak on Fodder Stack Ridge is 1,700 feet, while at that distance the first peak on the other ridge is 800 feet. That there is no doubt in his mind that the Commissioners went up Slick Rock Creek and that in the Tellico region from Laurel Top they went down the State Ridge, crossed the Tellico River and up Jenks Ridge. That the marked trees alone would show that the line went up Slick Rock Creek. That the map of 1821 alone would show it. And without either, the Commissioners, in his opinion, would have naturally selected it. And the same consideration is applied to the State Ridge. That it was not possible to reconcile the 1821 map with the Tennessee contention, and it tallies exactly with the North Carolina contention. And that by the courses and distances on the map of 1821 they could locate the objects, for instance Big Fodder Stack.

On cross-examination this witness says that he got Hale's elevations from his testimony, and that you approach the Tennessee River from the north in a southwest direction.

That he surveyed from the 101st mile to Laurel Top. He says he could locate the line with the aid of the 1821 map. Tree No. 30 is a chestnut oak thirty inches in diameter, two hacks and a blaze on the west side and the same on the east side.

That there are no State Line trees on the line around Tellico River.

On re-examination he says the straight line from the 101st mile tree down is an undisputed part of the line. That surveyors in mountain surveying take a general bearing, but in measuring, measure around meanders. That if you go around Tellico River that you deviate from the plat of 1821. That he tested Burns' notes from the Junction to Big Fodder Stack and on down the Slick Rock Creek to its mouth. That he had the geodetic co-ordinates of Hayo to Fodder Stack. He says that he wanted to prove to his own satisfaction whether or not the work was correct and from these geodetic co-ordinates he computed the air line distance between Hayo and Fodder Stack and found a difference of only six feet out of nearly twenty thousand feet between his computation and Burns' notes, and this proved that the survey around Slick Rock Creek was absolutely correct. The proper interpretation of the 1821 map is that the line follows the creek. That the hachures are sketched in. That it would not be possible in running a line from Virginia to Georgia to follow the water divide and make it anywhere near Tennessee.

On page 444 he says that there (is) nothing misleading in the plat of 1821.

Upon further examination by General Cates, Attorney General of the State of Tennessee (Record 445) he says:

"I was deputed by the United States Government to make this survey."

On page 446 he corrects some of the testimony he had given as written out, and on 447 states that the map of 1821 by courses does not go around the Tellico River.

On the following pages he corrects some statements about maps that were taken from the Congressional Library. On 452 his attention is directed to the Cession Act and on 454, he gives courses and distances from the 101 mile south and

afterwards reiterates that the map of 1821 according to direction would not go around Tellico. That he surveyed from the turnpike 3½ miles northeast of the river to the 59th mile, and tested Burns' work from the river to the 3½ mile point and gives the courses and distances from the turnpike to the 59th mile tree.

That Hayo Peak is southwest of Hangover Peak and that the average of Fodder Stack is equal to Hangover; that Stratton Bald is one-half mile from Junction and from Hayo to Junction is 2½ miles. That Hangover Peak is little less than six miles from the Tennessee River. That the sourwood tree was decayed. That Fain was with him on the lower part of the survey and pointed out some trees. That the State Ridge in that section ends about a quarter of a mile from Tellico River. That the 86th mile tree is about two hundred feet above the river. That the line around McDaniel Bald could not possibly agree with the map of 1821. That the Tennessee River at the locality of Tree 29, is 1,200 feet above sea level, and he then proceeds to give elevations taken from the Government contour map. That on the spur or ridge that leads from Slick Rock Creek up to Fodder Stack the timber is practically destroyed by fire.

On page 474 he states the divergence from the stream marked "creek" as shown on the map of 1821. That Hangover Peak is 4¼ miles from Cheoah River to the nearest point northeast. It is north 45 degrees east. That in surveying the line along the creek, Burns crossed the creek twenty-nine times. That the general course of the creek is southwest, and at a point half a mile from the river it runs 2,000 feet due west, or nearly due west.

On page 478 he says that no map is made that is absolutely correct, and that in making their survey, (the Gannet and Burns survey) they followed the meanders. On the map of 1821 the creek is not drawn carefully. That there may be a difference of opinion as to which is the main ridge on the southwest side of the river.

On page 483 he says that Brazier's map of 1833 shows the line going up Slick Rock Creek. That Cheoah River is several miles east of the line. That the course down the State

Ridge agreed very closely with the 1821 map; so closely that if left no doubt in his mind as to where the line runs at that point. At the Tellico River neighorhood the United States contour map does not tally with the 1821 map. According to the scale of that 1821 map, an inch is 13,200 feet. That the map only shows in a general way the summit of the mountain and some of the streams and rivers. That it is customary in making such maps to sight from one common object to another, and on page 492, he explains again that the total bulk or mass of the Fodder Stack Ridge would be greater than Hangover Ridge, which is short as compared with the main Fodder Stack Ridge. That the Little Fodder Stack strikes the Tennessee River one mile below Slick Rock.

He then goes on to give certain altitudes taken from the Government contour map, including altitudes on the Ridge to Cheoah and the one spur to the mouth of Cheoah, and reiterates that the ridge to Cheoah averages higher than even Hangover and Big Fodder Stack. He then mentions the ridge on the north to a point opposite the mouth of Cheoah and states that it averages as high as Smoky Mountain, but for the Tennessee River, which would seem to be a continuation of the ridge that goes to Hangover from the mouth of the Cheoah. That there are several other ridges from Hangover to the northeast, and one approaching the mouth of Slick Rock about a mile long. It commences at the river with a bluff about seven hundred feet high, and there are bluffs all along the south bank to the Slick Rock Creek, so it would be difficult to walk or survey a line. That the distance of 6.02 miles from the 59th mile tree to the bank of the river coincides with the 1821 map. That the words in the report of the Commissioners from the Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called Unicoy, would not indicate that when you crossed the river that you were then on the main ridge, and that in his opinion there is no main ridge until you reach the Junction. That the ridges spread out like the fingers of a hand and that the black line at the center of the shading on the original map is the State Line, and that that line strikes exactly in the mouth of Slick Rock. That the certified copies of that map differ

from the photographic copy in that respect. That by taking a straight line from the 64th mile tree south 75 degrees west 320 poles, you would land right at the mouth of Slick Rock Creek. That in looking towards Cheoah you were looking southeast on the left hand. That Slick Rock is on the right hand. That the Cheoah would be 50 degrees east, and from the 64th mile tree more than a mile to Cheoah. That a line south 75 degrees east for a mile would not reach Cheoah, but would land you on the south side of the river a quarter of a mile from Cheoah.

On page 500 the Davenport notes are taken up, and the courses and distances and objects named in that report called to the attention of the witness, and he demonstrates that the calls would not in any sense correspond with the line up Cheoah. It would not be possible to fit them to Cheoah, and that by going up that river you would be going away from Hangover Ridge further and further all the time. That Citico is on the west side of the Fodder Stack and runs west. That at the 72nd mile you would certainly be between Slick Rock Creek and Citico Creek, at least five miles from Cheoah, and at a point seven miles up the creek line, the point mentioned in the notes would be ten miles from Cheoah, and a point seven miles up Cheoah would be six miles from the Hangover Ridge.

He reiterates that the Slick Rock Creek is incorrectly sketched on the 1821 map. That the courses and distances of the Davenport notes from the 72nd mile would land you at the Junction, and that the Commissioners evidently did not reach the main mountain until they reached the junction.

That the course below from County Corners is southwest. That the other course claimed by Tennessee is almost exactly southeast. That the State Ridge goes southwest and the Commissioners report says southwest. That the 86th mile Holly tree is several hundred feet southwest of Tellico. That by the Tennessee contention you would not reach that tree at all by a mile and a half. That the nearest point would be Jenks Knob. That the Davenport notes as to the 86th mile tree correspond with the State Ridge Line.

He then describes marks on that tree and goes on to state

that you could not reach the 101st mile in going around the Tennessee contention in 101 miles. That Grassy Top Peak is a short distance southwest of County Corners, on the State Ridge, and is 5,200 feet high. Huckleberry Knob is three miles northeast of Laurel Top, 5,500 feet high. Hooper Bald is one mile northeast of Laurel Top and is 5,500 feet high.

On further cross-examination, he says that the State Ridge is southwest, and for two miles is higher than the other ridge. That from the plat of 1821 and his other information, the witness could see that the line could not diverge as claimed by Tennessee.

He then speaks again of Tree No. 30, and states on page 511 that he was six weeks on this survey. On page 513 he gives the courses and distances of the 86th mile tree across the Tellico River. On page 517 the Davenport notes were taken up again, and on page 518 the subject is pursued with reference to the incorrect tracing of the creek. On page 519 he states that Tree No. 25 is supposed to be the 64th mile tree. That the line from the 64th mile is nearly due west. That Tree No. 25 is 1,550 feet from the river. That in all maps between successive mile marks there are a number of turns or angles not shown on the map.

On pages 522 and 523 and 524, the altitudes are shown by the Government contour map and are gone into further. On 526, the witness says that he had never seen the original of the 1821 map, but speaks of the two mile circles very close together at about the 39th mile as being indicated for the same mile circles.

That Cold Spring Knob is 3,500 feet high and three miles from the river, and the subject of altitudes is then continued.

Commencing on Record, page 529, Burns notes on the survey north of the river are introduced, and on page 539, Gannet and Burns' notes from the 101st mile northeast to Jenks Knob.

On page 692 of the Record, this witness testifies with reference to the Davenport field notes, and says with reference to the wording "crossing the Tennessee River to a large white pine, south side of the river at the mouth of a large creek, 65th mile," he recognizes as leading to Slick Rock Creek.

That that call means at a large white oak at the 64th mile; that from the 64th mile to Tree No. 29 is south 30 degrees west, and that it is southeast to the Cheoah River. That the field notes fit the 1821 plat, but do not fit Cheoah because its situation would lead southeast. That there is no stream opposite Tree 29. There is a bluff there. That Yellow Hammer Creek runs into the Cheoah and there is no creek for several miles below Slick Rock; and that if you went along Cheoah you would cross no stream in following any ridge.

In explaining the difference between the marks and that straight line, he said that the surveyors evidently sighted from the bluff north of the river to Slick Rock Creek, but not being able to follow that sight, traversed along the shore of the river and crossed it at the first available point.

That the line south 75 degrees west from the 64th mile tree corresponds with the course shown of that line on the map of 1821, and would be in the line with Fodder Stack. That Cheoah River could not be crossed and recrossed except by boat. That according to the Davenport field notes the creek is not mentioned after the 70th mile, which indicates that they then left the creek. That there is no creek in that country of the shape of Slick Rock, as depicted on the map of 1821; that the creek was evidently merely sketched in.

On page 697, he says the line is accurate, but the river and sketching carelessly done. That the field notes and the map of 1821 correspond with the line as claimed by North Carolina, but not at all with the Tennessee claim. The field notes at the end of the 72nd mile say, "on a ridge between the aforesaid creek and Citico Creek," which would correspond with the line up Slick Rock Creek. That Citico Creek does not head on Hangover, and it cannot tally with the Tennessee contention. That the notes confirmed the 1821 map and agreed with Burns' map, and that Burns' map of a portion of the line made by the Commissioners of 1821, tallies with the original map of 1821. That at the 86th mile, the Davenport notes call for a Holly tree, which is the tree heretofore designated as the 86th mile tree. That the notes also confirmed the North Carolina contention at Tellico. That the line north of the river is south 49 degrees 24½ minutes

west, but south 30 degrees west in crossing the river, according to the Tennessee contention. That the 59th mile tree is marked "59 M." This witness verified Burns' notes from the 31/2 mile point of beginning of Mr. Burns to the river, and the notes of the survey of Slick Rock Creek and the courses and distances, and identified the trees. That the line practically follows the creek. That Fodder Stack is south 45 degrees 50 minutes west.

On page 708 that the last call in the 72nd mile by the notes as south 30 degrees west, should be 30 degrees east. He says this mistake would not throw the whole plat out, but would only swing the course a little. The mistake is in one call only.

On page 711 he repeats that the surveyors must have sighted from one summit to another, but measured along the meanders of the mountains, which he states again on page 712, and adds that you have to generalize in every survey. That the error at the 72nd mile would not disarrange the whole survey. That you would have to correct the error and accept the marked line, and explains what approximation means in surveying, and on page 744, what he means when he speaks of the course being approximately correct. He further explains why there was no error from the 53rd mile to the Equinoctly Path. And further on page 747 explains his use of the term "approximation."

Among the local surveyors called by the complainant, was

R. W. COLLETT,

who testified (Record 547) that he had surveyed the line on the State Ridge and remembers the holly tree at the 86th mile, and gives certain grants issued by the State of North Carolina in that territory, which he had surveyed, and files a map of his survey, facing page 550.

W. P. CHAMBERS,

who lives in Bradley County, Tennessee, had been County Surveyor of Monroe County eight years. He had had some experience in trying to arrest a man on disputed territory on a Tennessee writ, but abandoned it. He had in about 1882 made a survey of the land between Slick Rock Creek and

Hangover for one W. L. Albright, who directed him to survey from there. About that time H. M. McCroskey began talking about making an entry there, and the witness informed McCroskey what he was doing. Both Albright and McCroskey made entries, but the Governor refused to issue any warrant. This witness says that he had the map of the Ocoee District and that he started a survey north of the river from State Line marks there. This was a subsequent survey made recently in connection with a Mr. Mayfield in the interests of Mr. Cozad.

He says from the north when you look directly south, the Hangover Peak shows up a little more prominent, but in a general way the line up Slick Rock Creek and Fodder Stack seems to be the most prominent way to get out, because if you cross the river immediately you butt up against a considerable bluff, and when you get up to Hangover, you have a decline and it is so rocky you cannot get up there. That it is rocky on Slick Rock Creek, but as you gradually walk to Fodder Stack Lead, it has the appearance from there of being a smooth ridge. That the line seems to be in the general course of the State Line on the North, while Hangover is south. That he found Tree No. 29 and just opposite there was rough steep mountain land. That in going down the north side of the river towards Slick Rock Creek he also found a chestnut oak marked with three hacks, and a little further found a maple marked. And just below the mouth of Slick Rock found a gum that was marked. All of these trees were marked with old marks.

That the next day he resumed work at the mouth of Slick Rock Creek and that he found marked trees up the creek and up the ridge to Fodder Stack and from there to the Bald. That the marked trees on Slick Rock satisfied him that the line went up that creek. These marks seem to have been made at the same time, with the same instrument, and in the same manner.

On page 557 he says he made an unsuccessful effort to survey Hangover. On 558 he speaks of having been told about the line running up Slick Rock Creek by Milligan, which we believe has already been mentioned. He then goes on to say

that the map of 1824 takes you up Slick Rock Creek, and from there to Big Fodder Stack. On 550 he says that the trees he found marked on the north side of the river between Tree No. 29 and Slick Rock Creek were marked on the north side running in a westerly course; marked as if going down the river, except the gum, which is below the mouth of Slick Rock Creek. He then describes how surveyors mark trees. On 561 that the marks on the gum indicated that the marker crossed the river and went up the creek. That the Ocoee map shows the line going up the creek, and that there are no grants in Monroe County, Tennessee that call for land beyond Slick Rock Creek.

JAMES CRISP (Record 562),

says that he went out with one H. M. Kent, a surveyor representing the Babcock Lumber Company. That they went on the north side of the river and got onto the undisputed line, but had no instruments with them, and that Kent took a stick and sighted back on the line and then sighted in the other direction on the same bearing, and that it pointed right to Big Fodder Stack and the Slick Rock Creek. That they then went down and struck the Tennessee River and investigated Slick Rock Creek and they reached the conclusion that the line ran up Slick Rock Creek and Big Fodder Stack, and Kent said he would so report. That they investigated the Hangover Ridge but found no old marks.

FRANCIS H. LOVINGOOD, (Record 565),

This witness speaks of the Tellico Country first, but says that he began his survey at the mouth of Slick Rock Creek and went up the creek five miles and then up the ridge to Big Fodder Stack and thence on around to County Corners and thence up the State Ridge running in a southwest direction, and that he has notes of that survey and that he found State Line trees along that line and found the 86th mile holly tree, twenty-one miles from the Tennessee River. That he blocked some of the trees and counted the growths and satisfied himself that the marks were State Line marks of 1821. *

From Laurel Top the State Ridge is continuous and from County Corners to Unicoy the ridge seems to be the same

ridge. That although he searched, he never was able to find any State Line marks on the line around Tellico River. That in order to take that line as claimed by Tennessee, you would have to run southeast at a right angle to the State Ridge. That there is a spruce pine near the 86th mile tree with three hacks on the southwest side. That he found marks on the Slick Rock Line and on the ridge. During this survey, he says on page 570 that running up Slick Rock five miles they marked a five mile tree there at the point where they turned up the ridge.

On cross-examination, he says that this survey was made in 1897, and that it seemed to be the understanding of the citizens there that Slick Rock Creek was the line. Hyde, another surveyor, was with him on this occasion. That they formed their opinions separately but agreed as to the true State Line, and they found plenty of marked trees on it, and at Tellico they decided from the marks that State Ridge was undoubtedly the line.

C. L. SLAGEL (Record 753).

who resides in Macon County, North Carolina, says that he was with Burns on one occasion. He says they could see Slick Rock Gorge from a point 600 feet north of the Tennessee River, and that following the calls of the Davenport notes the stream marked "Creek" could be no other than Slick Rock Creek. That he found a birch described in the notes at the 67th mile, a sycamore at the end of the 68th mile, and a maple at the end of the 69th; a birch at the end of the 70th mile and an old tree and some old marks, old enough to have been made in 1821.

In general he corroborates Mr. Burns as to the trees mentioned in the Davenport notes as they discovered them. That they then went to the junction then turned and came back by Hangover, and searched for trees, but found no State Line trees. That the Davenport notes carry the line along the creek and that nobody who made those notes could have made them unless he surveyed along that creek. That they could not fit the Tennessee contention at all. That about 6½ miles southwest of the Tennessee River they bend to the left, whereas

the Tennessee line bends to the right; and the notes confirm the North Carolina contention.

On page 765 that the Fodder Stack is the main ridge, and he speaks of the bluffs just opposite Tree No. 29.

On page 775, he says that in his opinion the streams and mountains on the map of 1821 were merely sketched in. That the Davenport notes generally follow the stream. On page 777, that from a point three miles northeast of the river, the Hangover does not appear to be the main ridge. That it is not as well a defined ridge as the other towards the river.

H. S. HAYS (Record 794).

This Hays and J. C. M. Bogle surveyed the line back in 1896, or thereabouts, for use in the original hearing of the case of Hebard against Belding and others. They were seventeen days on this survey and on searching on Hangover ridge they found no State Line marks. On page 796, he says that the black oak spoken of by Hale is not a State Line tree. He describes the lines and furthermore states that the sourwood was not a State Line tree and gives his reasons, and adds that there were no State Line trees from Big Fat Gap to the Junction. That the main lead of that ridge goes to the Cheoah River from Hayo. On 797 he says that he ran the line up Slick Rock Creek to the ridge and to Big Fodder Stack and thence to the Junction, and that he found forty-one marked State Line trees on that line; ten fore and aft and thirty-one side line trees, and that there were twelve State Line trees from Slick Rock Creek and Big Fodder Stack Gap Branch. That Tree No. 1 was a cucumber and that Exhibit "A" Block was from that tree. That the marks were seventy-six years old, this survey having been made in 1897 instead of 1896. That the second tree was a birch and the third a poplar, and trees 4, 5 and 6 were birches on the east side of the creek, State Line trees. No. 7 was a lynn on the east bank of the creek. The 8th was a spruce pine standing on the east side of the creek, and Block B, was from No. 8, these blocks having been introduced in the Hebard case. Nos. 9, 10, 11 and 12 were spruce pines on the east side of the creek, State Line trees.

On the ridge to Fodder Stack and to the top of Big Fodder Stack, they found five fore and aft and eight side line trees. That No. 14 was a spruce pine about 12 poles from the mouth of the creek; No. 15 was a spruce pine side line tree; No. 16 was a spruce pine marked as a State Line tree.

That the general course of the creek carries you up the ridge to Fodder Stack. That No. 17 was a spruce pine stump, fore and aft. No. 18 was a spruce pine fore and aft; No. 19 a spruce pine side line tree.

He then goes on locating and describing all of these trees up to and including the 41st, several of which were blocked (on pages 800 and 801), and states on page 800 that from where the ridge strikes the main lead to the Fodder Stack and to the junction he found seven trees, two fore and aft and five side line trees. That these forty-one trees all had old marks on them. All were marked with the same kind of axe. That the marks on Hangover were not with the same kind of axe, but an axe such as Piercey used, and that there were no marks there earlier than 1851. That the trees along the Fodder Stack are mostly chestnut and oak. That the chestnut does not hold marks as well as other trees. That the Ocoee land district map corresponds with this witness's survey, and that on the Ocoee map from the mouth of Slick Rock Creek, to the point where the line leaves the creek is 1,160 poles; on this witness's map, 1,120 poles. That the North Carolina contention is correct.

On cross-examination, he says he looked first for the Forked Ridge, which leads from Big Fodder Stack to Slick Rock. That the tradition was that the line ran up that ridge. That Little Fodder Stack would average higher than Hangover. That Tree No. 1 that he mentioned was about one pole west of the creek. He then re-locates the other trees again for the cross-examiner.

On page 808, he says that they had to cross the creek and re-cross it several times going up the creek, because it was so rough, and on re-examination (809), he says that the ridge running from Hangover to Chcoah is the main ridge. He then sets out the fact that he made a survey of the Peet and Gilbert grants, of which a plat is attached, which covers a large part of the property that is disputed.

J. C. M. BOGLE (Record 812).

This gentleman was with the previous witness. He states that the trees mentioned by Hale and Wilson on Hangover were not State Line trees and had no State Line marks on them and were not over thirty or forty years old. That the Hare oak mentioned by Hale is three-quarters of a mile from the river and had no State Line marks, and the marks were not old enough. That the marks on the sourwood tree were irregular and made by a broader axe; were only forty or fifty years old and were not State Line marks. That a black oak mentioned by Hale as being 1 mile and 63 chains from the river had marks on it fifteen or eighteen years old. That at a mile and a half he found the chestnut oak that Hale speaks of, and that it was not marked, just hacked, and another that they thought was marked for a North Carolina corner. That the marks on the North Carolina line as he and Hayes ran it, were very old, and that he was with Hayes from the mouth of the creek to Tree 26, and he corroborates Hayes as to the marks.

On page 817, he speaks of the Ocoee District map, which was made in 1837, and shows a line corresponding with the line up Slick Rock Creek. That in order to cross the river at 65 miles, you would have to go to Slick Rock Creek.

On 824, he describes the marks on the sourwood tree and states that the main ridge as called for by the report of the commissioners begins at the Junaluska.

H. F. HYDE. (Record 825.)

He lives in Graham County, made a survey in 1897. He says that he ran up Stock Rock Creek five miles and 101 poles to the ridge that leads to Big Fodder Stack, and thence to the Stack and to the Junaluska, and that he found State Line marks all along that line; and on the point on the map 31 poles from the point on the Slick Rock Creek found a sourwood pine with marks of seventy-six years ago.

He then speaks of Exhibits Nos. 1 and 2, which are blue-prints of his survey, and that beginning at the mouth of

Slick Rock Creek extending to the top of Fodder Stack he found five or six trees marked as fore and aft trees, some of which had been blocked, and many side line trees. That he had recently surveyed along the Hangover lead, having Hale's notes with him and copies of the depositions of Hale and Wilson and Muller, and that he followed accurately the courses and distances and located his trees. That he found the black oak or red oak, about three-quarters of a mile from the river and states how it was marked; that it was not a State Line tree and explains why. He also testifies in a like manner about the sourwood and describes its marks, and says that they are not State Line marks. That he found the hickory noted by Hale as running 1 chain west of line, running from his station 114 to 115. That it was not a State Line tree. That it was a line entry tree of Entry 920 of North Carolina.

On page 829, he states that he found all Hale's trees. That he found no State line marks except possibly on one tree, but these marks he discovered were not old enough, but there was plenty of large trees on Hangover Lead.

On page 832, he states that Hale's map is incorrect in giving outlines of creek and leads out the ridge up to Fodder Stack.

On Record, page 833.

H. P. HYDE is recalled.

He says that from tree 29 to the mouth of Slick Rock is 89 chains. (It may be proper to remark that the chain these surveyors used was two poles.) That the Spruce pine mentioned near the mouth of the creek had been burned and the marks could not be discovered. That the Ocoee plat shows that the east line is Slick Rock.

This witness says that he again inspected Hale's trees, which only confirmed his former statement.

On 838, he speaks of them again and states that the marks on the black oak were made with a smaller axe than Slick Rock marks. Also on page 839, he continues about Hale's trees.

This witness states that in 1883 he surveyed North Carolina entry No. 418, for Cooper, an introduces his original

certificate of that survey. That according to Hale's map, the distance from the 61st mile tree to the river is 3 1/2 miles.

On page 843, he says that the fore and aft tree on the north side of the river is marked on both sides going towards Slick Rock Creek. That the main ridge (page 844) commences at the junction.

REUBEN CARVER (Record, 850)

testifies first as to a lease from Belding and associates, claiming under their North Carolina grant to John Debity and John Debity, Senior. This gentleman was along with Hayes and Boyle.

On page 851, he says:

"The conclusion I reached as a surveyor was that the State line ran up Slick Rock Creek and thence up the ridge and over Big Fodder Stack."

That it was not his business to keep tally on the trees, and he did not see them all, but he did see fifteen or twenty. That they searched over Hangover for State line trees and found none. He speaks specifically of the black oak and the sourwood mentioned by Hale. On page 852, he says that the ridge to Chcoah is the biggest of the Hangover Ridge. This witness was recalled (Record, 854) and says that he had made a re-examination of the Hangover lead and Hale's trees and confirmed his former statement.

DEFENDANT'S EXPERT WITNESSES.

W. D. HALE, a Tennessee surveyor.

Hale had been a witness in the old Hebard case and in the bill of review phase of that case and has testified further in this case. His testimony in the original Hebard case by stipulation has been incorporated into this record and commences at page 1311. He says that he was employed first by Hebard, and in December, 1895, and January, February, and April, 1896, attempted to locate the State line in connection with O. W. Muller, J. K. Wilson, and two other Tennessee surveyors.

That they went about three miles north of the river where the line is undisputed, and commenced their survey there; followed the line in a southwest direction, tracing the marks to the river, and finding the line marked with two hacks above a blaze, and exhibits a map which was Exhibit "A" in that original case as a result of his survey. And it is also Exhibit "A" attached to the answer in this case.

He continues after locating the line north of the river:

"I first examined the spurs of the Hangover Ridge where they bluff off to the river, because the butt of that ridge is directly opposite the butt of the ridge on which I found the State line marks north of the river."

He was governed to a great extent by the topography. That looking southwest from the butt of the ridge north of the river on which the line is marked, he first looked for the main ridge and saw two prominent ridges, the Hangover and the Fodder Stack. He says that Hangover is decidedly the highest and most prominent. He then looked for the route to Hangover and saw a large continuous ridge reaching from the Hangover Peak to the river directly opposite where the line is marked north of the river. Next he observed the ventas. The Hangover and the ridge to it are a little west of south, while to reach the Fodder Stack where it strikes the river, he would have to go northwest and down the river one half mile and from there nearly due west more than three miles. (In giving these three miles he alludes to reaching the Little Fodder Stack, which appears in evidence repeatedly throughout the case.)

He says Hangover Ridge more generally follows the course of the State line north of the river. He then, page 1313, mentioned many trees, intending to say that these trees are State line trees on that ridge, and in particular mentions a black oak on the Hangover Ridge three-quarters of a mile from the river.

On page 1315, he speaks of having gone on to Slick Rock Ridge and having then descended to Stiff Knee Gap three miles and 67 chains from the river. From Stiff Knee Gap he climbed to Stiff Knee Knob 3 3/4 of a mile from the river ascending 800 feet in 55 chains, then descending to the Lit-

tle Stack Lead, to the head of Beardon Shaft Lead, which is the continuation of the Fodder Stack Lead; then ascended to the Little Fodder Stack 4½ miles from the river; then descended to Wild Cat Gap and other gaps and knobs to Big Stack Gap 7 1/8 miles from the river. That 6.78 miles from the river he found a meandering line marked with two hacks and a blaze, but found that they followed trails regardless of the tops of ridges, and found the marks to be only twenty-three years old.

About 8 miles from the river he found white oak marked with two hacks and a blaze; very old marks; and then mentions further along a chestnut oak with the same kind of marks. He then continues that there is a bend in the Tennessee River below the mouth of Slick Rock Creek, and that if the land in dispute is in Tennessee, it is in the Ocoee Land District.

On page 1321, he mentions the sourwood tree which he found at Sourwood Gap.

On cross-examination (page 1326) in answer to question 107, which directed his attention to the question as to where the Commissioners of 1821 had located the line, and his answer in his examination in chief, "On the Hangover Lead," this question was put:

"Now I ask you in view of your testimony given today on cross-examination, whether you pay any attention whatever in forming your judgment, to the lines run by you, viz: 'The Hangover Lead or the Fodder Stack Lead?'"

To which he answered:

"No. My running the line did not affect it."

"Q. 108. Repeating the first part of the first question, and in view of your testimony given on cross-examination, will you state what elements in the question asked you on direct examination, viz: No. 33, you relied upon in forming your opinion?"

"A. The Commissioners' report and the topography."

"Q. 109. If it had not been for the Commissioner's report, would the topography have been of any service to you in forming your opinion?"

"A. It decidedly would."

"Q. 110. Why?"

"A. Because it was the most natural boundary, the most prominent ridge."

On page 1331, he says the marks on the sourwood tree were very old marks, but at that time he does not mention that the tree was decayed inside, so that the age could not be determined, and on page 1333, says, "I don't know that that sourwood tree was marked as a State line tree."

He states that he has been twice back to Slick Rock Creek since he had given his deposition, and that he had blocked the sourwood and the black oak, which by the way was a red oak. On page 1336, he says that the black oak was on a spur leading up to the Hangover from about the mouth of Slick Rock Creek and on the turn in the ridge and that that turn marks an angle larger than a right angle. He does not doubt that the sourwood and the black oak were State line trees. On pages 1338 and 1339, he tells how he notes the age and then states that the heart of the sourwood had been rotted out and then begins to tell why the Ocoee District map stopped at Slick Rock Creek. As given on page 1339, this reason was that the surveyors were tired and worn out and that the ground east of the Slick Rock Creek was so steep and rough that they abandoned the survey and did not regard the creek or the limit of their survey as the State line, but regarded the ridges east of the Slick Rock Creek as the State line. He claims to have obtained this information from a Mr. Harvey, who claimed to have acted as chairman on the original survey sectionizing the Ocoee District.

On page 1339 he takes up the matter again of the marks on the trees of the so-called Slick Rock line, and claims that they are not State line marks. On page 1124 is his testimony on the bill of review in the Hebard case, and on 1125 he states that the 26th mile tree is at an undisputed point on the State line and that the 59th mile tree is also. At this time, the map of 1821 had been found and he had possession of it and testifies about it. On page 1126 he says it is not possible to get accurate angles from the 1821 map. Inasmuch as one hundredth of an inch on that map represents a distance of 132 feet; this is not strange. That they can only go approx-

imate courses and distances. He commenced at the 59th mile tree with the map of 1821 and tried to run the line by it and got into North Carolina and then into Tennessee backwards and forwards, at one time a mile away from the line. That the map was no aid, but rather a hindrance. That it was not possible to locate the line up Slick Rock Creek with this map. That crossing the river at right angles as the map indicates, you would cross one-half mile east of Slick Rock, and taking the bearings you would be crossing and recrossing the ridges and foothills, and not be on Slick Rock Creek and except in one or two places you would not get closer than one-quarter of a mile to Slick Rock. That the map shows that the commissioners crossed at some stream. That it must have been Cheoah River.

On page 1127, he says the map is only a sketch map and that they have sketched the Cheoah River and called it a creek.

On 1128 he explains why he thinks it is Cheoah. He says that the track of the Commissioners of the marked trees show that they struck the river fully a half mile east of Slick Rock Creek. That Cheoah River is the first stream of any size east of the line, and is the stream that would naturally show on the east side of the line. That the description in the Cession Act of the State line from the Tennessee River to the main ridge would naturally take the Commissioners from the river direct from the point at which they struck it and crossed it, up the ridge, that is east of Slick Rock Creek and west of Cheoah River. He then describes the spur to Cheoah north of the river and states that it is the main ridge for some distance, and that there (is) a ridge from Hangover to the mouth of Cheoah which leaves the Hangover about at Sourwood Gap, one mile from the river.

The first of these spurs that he speaks of is north of the river; the second one south of the river, and he says the two spurs, one on the north side and one on the south side, would be more convenient for strangers to follow trying to cross the river and reach the ridge on the south side.

On 1129, he speaks of the Lester Ridge on the north side leading off toward the mouth of Slick Rock Creek. That the

shading on the map of 1821 would indicate that the slope of the ridge is on the side where the shading is, and that they were on a ridge. South of the river it would indicate after passing a certain distance from the river, that they were on the top of a ridge.

On page 1130, he gives the angles, some five in number, on the map of 1821, and goes on to state that no ridge would on the map and that none near the mouth of Slick Rock's creek would fit it. That it does not run in the right direction. "Ellis Burns' map, Exhibit "H," shows the line north of the river correctly. That the map of 1821 does not show it line following the creek up to a spur, but does show that about a mile and a half from the river they were on some ridge. No surveyor could take that map and locate any ridge they were following. It is so inaccurate; the scale is so small, and there are no names for any mountains and streams and the witness would not know how to follow that map even where the line is undisputed, as it is misleading.

On 1132, he says that the general southwest course of the map is approximately correct and as a sketch map to show that they followed the crest of a ridge and crossed streams, it is correct; but as for showing where they followed the crest of the ridge or crossed streams, the map is not worth the paper it is written on. And further, that it does not show correctly the ridges around Tellico.

On cross-examination (Record, 1133) he says: "I took each course separately from the map. For twelve miles south of the river I took each particular course, not merely general bearings."

The map of 1821 for seven miles southwest of the river is south 41 1-2 degrees west. The next three miles is south 20 degrees east. That from the river to Hangover is south 8 degrees west and from there to the Junction is south 60 degrees west. That he is not sure whether he used on his surveys a compass or a transit.

On 1136, he says the map of 1821 indicates that they went directly across the river and at a distance of two miles they reached a ridge, and it is hard to tell from it whether they were on a stream or in its vicinity only. That it is very

mountainous in the vicinity of both Slick Rock Creek and Cheoah River. That for the first two miles it is hard to tell whether they were following a mountain or going up a stream, and that there is no possible way to locate the line except over Hangover. That on his map Hangover and Big Frederick Stack ranges are indicated and the lines of etching represent 100 feet. That the "x" mark on the map indicates from its trend that they must have checked the survey on the left and that the map is entirely worthless. That you can not take the map and scale the courses and distances and follow the marked line, and that to an ordinary reader they must have gone over Hangover. The map and report of the Commissioners considered together indicates that.

On 1142, he says that no stream comes up opposite tree 29. That Slick Rock is to the right and Cheoah to the left. That Slick Rock Creek runs northeast and Cheoah northwest.

On December, 1143, he is submitted to further examination, in this particular case, and says that "now testifying he in September, 1910, made a further examination of the line from the 50th mile tree with one McNabb and John L. Williams. That at that time he only examined a little of the route. And in the winters of 1909 and 1910, he was there with Moller and John L. Williams. He spent ten days going from the 50th mile tree to Jenks Knob, all of which examination is a pittance.

Facing page 1144 is his map, Exhibit "A," of the line from the 50th mile tree to Jenks Knob. That it points out the line where undisputed and states that he took a portion of the Slick Rock survey from Hoyt's survey. That he surveyed the ridge that runs to Slick Rock from the Hangover and the ridge to Cheoah is just sketched in. That he surveyed one mile of the Cheoah River. That along the McClelland survey he found State line marks.

On page 1149, he speaks of tree No. 50, mentioned by Burns and Gannon. That he had inspected that tree and checked it and that it had two blacks above a blaze on the west side and the same on the east side, fifty-seven or fifty-eight years old, and that Exhibit No. 2 is the block he took

out. That he only cut out the blaze and destroyed the hacks and left part of the block on the ground.

On 1152 he says that on Burns' block taken from the other side of this tree, the blaze is only fifty-seven or fifty-eight years old. That it is often difficult to tell the age of marks. That marks may look fifteen or twenty years old and may be seventy or eighty. On 1155 he speaks of Tennessee grants to Parsons and Chambers made in 1850 and 1852, one line which runs by tree 39. He then gives the McCroskey grant, which covers the line in dispute in Graham County, and to Griffiths and Morton and the Ocoee Land District plat, and the records of the cases of Wetmore v. Styles and Steelben v. Lovingood are Exhibits 7 and 8 of this witness's testimony here introduced.

On 1161 he says that the main ridge is around Tellico. On 1162 he gives the altitude of the mountains at different places on the State Ridge and some of the peaks on the Hangover. That the State Ridge is the highest and most prominent for about one mile, but that it does not reach Tellico River as a ridge.

He then describes the Tellico Country and the 50th-mile tree and says (page 1.167) that he found no marks from there to Jenks Ridge. That Exhibit 4 shows the South Fork of Tellico.

The Tennessee Act of 1841 is then alluded to and on page 1.168 Coin Creek. On page 1.171 he says the map of 1821 from the 100-mile tree to Hiwassee River is 26 or 28 poles longer than the calls of the Commissioners. That 100-mile tree is fixed and that the call from there is a south course for two miles and 220 poles, but it measures 2 miles 280 poles. At page 1.172 he says the map of 1821 shows a line around the Tellico River, but removing the etching and taking the line only on the map of 1821, it would conform to neither contention. On 1173 that taking the Cession Act of 1789, the Code of Tennessee and the report of the Commissioners, he would have to follow the course of the ridge and the water-shed around Tellico from Hangover. That the water-shed ridge is the main ridge. It keeps continuous elevations but has some low knobs and deep gaps, but is the only

ridge from the Tennessee River south that complies with the requirements. On 1174 he says the map of 1821 shows that they followed the crest of a ridge and that the line appears to cross 60 poles below the junction of the creek with the river and there seems to be a ridge there.

On 1.175 it would show that at two miles they appeared to be on the crest of a ridge, and on 1,176 he explains that the altitudes on his map are comparative. On 1.177 that the stream marked "Creek," from the length of the stream and the general trend of the stream and ridges, he can only think was intended for Chewah.

On 1.177 he says that the headwaters of Tellico appear 80 poles west of the line on the map of 1821. On 1.178 he states that nearly all of his surveying was done in 1896, but the State Ridge line in 1899. That the Tennessee contention is right in his opinion. That between the Junction and Laurel Top the line is undisputed. That going northeast Fodder Stack drops down about three-hundred feet. You would not know when you reached it. On page 1180, on cross-examination, he says the line around Tellico is three or four miles too long. That it is five miles from Jenks Knob to County Corners by the State Ridge and 11 1/2 to Tellico. That from the calls of the Commissioners' report he does not know how he would have run the line. That leaving out the words "to some height" and continuing it to distance that he could come over the State Ridge. That according to the report, the 161-mile line would be 109.83 miles around Tellico, and by actual measurement from the Candlemaker Turnpike to the 161-mile is 100.5 miles, and that there are no marked trees on the line around Tellico. On page 1183 that Grassy Knob Ridge around Tellico breaks off from the State Ridge at nearly a right angle and is nearly a right angle to Jenks Knob. That he never saw any map that shows the line around Tellico, and only judges because it should follow the crest of the ridge. That Grassy Knob is on the State Ridge.

On 1.185 he says "the only reason I say that the line goes around Tellico is that the Commissioners say they followed the main ridge," although he admits that the one is a ridge and that the other is a chain of mountains with big peaks

and its valleys, and adds that you would naturally follow the State Ridge for a mile or two; that the general trend of that ridge is southwest and that the southwest course is not intended to record every crook and curve in the mountain. Some of those courses would be in the opposite direction.

On page 1,187 he says as a whole you do not travel southwest to get to points along the line as he surveyed it. Coming back to the Slick Rock district survey, made in 1896, he says he took part of it from Hyde's survey, about three and a half miles. That he got Hyde's map from Seymour. That he commenced at the 59th-mile tree, marked 59 in figures and M. S. 1-2 miles from the river, or exactly 5.63 miles. That the 62d mile would end 37-100 of a mile south of the river. That the river to Hangover is south 8 deg. west, to Junction south 60 deg. west.

On 1,192 he says he measured horizontally. He put no elevations on the spur to Slick Rock Creek. On 1,173 he says that the trends of the 1821 map and his map agree at undisputed points. That the 61th-mile tree is 33-100 of a mile north of the river. That his line crosses the river south 11 1-4 deg. west and that the straight line on the 1821 map from there is about south 80 deg. west and that the line approaches the river from the 59th-mile tree at south 15 deg. west. That one mile back it is south 30 deg. west. Between the 62d and the 63d mile, south 82 1-2 deg. west. But the general trend is south 15 deg. west.

On 1,195 and 1,196, speaking of tree 30, he says he knows of no grants as old as 1821 in that locality, and from tree 30 to Slick Rock Creek there are no old marked trees. That on tree 30 the hacks slant and the blaze is perpendicular and the marks on that tree were distinctly State line marks. On 1,197 he says that the State line on the 1821 map strikes 60 poles west of the mouth of the river. That on the north side there is a spur which leads off from the Smoky Mountains to Cheoah, and it is the most prominent spur. That there are no State line marks on it. That tree No. 30 is ten or twelve feet from the river. That the mouth of Cheoah is a mile and a quarter from tree 29 south 15 deg. east. That there is also a ridge on the south side from Hangover to Cheoah and

north of the river being remarked in 1853. That side lines are only marked on one side.

On redirect examination, page 1,210, he again speaks of tree No. 30. That in speaking of 101 1-2 miles to the 101st-mile tree, he takes the 65 miles to the Tennessee River. From the river to the 101st mile is 35.5 by the State Ridge, running over Hangover. That it is more by running up Slick Rock. That there (are) no State line trees around the head of Tellico.

On 1,212 he says eliminating the age, and taking the line alone, it would not go around Tellico, and that Slick Rock Creek and Little and Big Fodder Stack ranges are only sketched in his map.

On 1,216, that from the south bank of the river to the Junction, by his notes, it is 8.16 miles, and to County Corners 7.73 miles. That there are 66 mile circles north of the river; the first mile circle north of the river is 2,392 feet from the river. That the width of the river on the map of 1821 is 2,105 feet. In fact it is only 568 feet. That the map of 1821 shows the mile circles south of the river 1,118 feet and the first circle north 3,510 feet.

On 1,218 he gives the Peck Grant in Tennessee, and on 1,219 says that map of 1821 cannot follow any one ridge or stream, and that it is not worth the paper it is written on. That the south line of that map to the mouth of Slick Rock is one mile long. On 1,221 he says he spent fifty-eight days surveying the whole line, and gives the difference in actual survey between certain lines north of the river being in excess of what the 1821 map shows. That the map of 1821 shows a creek turning away from the State line at about the same angle as Chesah, and therefore it cannot be Slick Rock Creek.

On 1,226 he says that in the 66 mile circles north of the river the 39th and 40th miles are meant for the same. That the map of 1821 is a sketch map. That the witness did not have the North Carolina Code nor the Commissioners' report in making his survey, and that he did not, in making that survey, recognize three locks as State line marks at all. That the map of the Ocoee Land District is only a sketch map and very inaccurate.

On record page 1,622, this witness is again examined with the Davenport notes, and on 1,623 describes how he tested the notes; also on 1,624. He says he allowed five degrees variation, but in making this test he used the compass. That he never went to the maple on Hiawassee, but it was pointed out to him from across the river, and he has no doubt it is the same tree the Commissioners marked.

On page 1,626 he continues the comparison. He says in looking down these lines on Burns' Exhibit "D," in answer to the question:

Q. "Is that a correct, or rather an accurate representation of your running of that line as compared with the line laid down there on that map, showing the North Carolina contention according to the scale of that map?" He answered: A. "No it is not. There is either a little discrepancy in the surveying by Mr. Burns and ourselves, or in the plotting by Mr. Burns and ourselves." "At one point this line very nearly touches the creek."

Q. "What line do you mean?" A. "The red line running from the 50th mile tree southwesterly very nearly touching the creek is closer to the creek in fact than we ever got in the survey, so that the whole line is a little bit east from where it was actually run."

In reference to the location of the head of Beaver Dam Creek, he says it was located by Williams too near to the Jenks Knob, probably a quarter of an inch on the scale of that map. That the south 75 deg. west on the map of 1821, according to the notes, strikes 135 poles west of Slick Rock Creek, and on 1,632 he continues his comparison of the field notes of Davenport with Burns' survey and states that the pine stump at the mouth of Slick Rock was in reality an oak stump, and says something in that page about being carried 16 miles into Georgia.

On page 1,633 he says the blazes on tree 30 are eighty-seven years old, but there are two blazes, and on 1,634 says that the map of 1821 could not have been made from the Davenport notes. That he has not changed his opinion. That the commissioners might have run up Slick Rock Creek but only tentatively, and then speaks of the bluff opposite tree 29.

On 1,635 he says, "I believe the Commissioners ran down the Stick Ridge and crossed the Tellico, but abandoned that line." On cross-examination, page 1,638 he stated that his copy of the Davenport notes corresponded with the Williams copy. That they followed the courses and distances exactly; and on 1,639, that they always measured the straight line distances. That in going from tree 29 to Hangover, you pass to cross, but the map of 1821 shows a creek and the report says that the commissioners abandoned the Stick Ridge line. On 1,641 that he thinks they ran they map as a sketch map of the country and that they did not expect any body to criticise it, and took the main ridge rather than a certain.

The next witness for the defendants is

JOHN L. WILLIAMS (Record, 1,661),

a resident of Polk County, Tennessee. After giving his experience in locating land for a little more than eight years he was county surveyor of Polk County, he was [illegible] he had established the State lines of some 2 1/2 miles along the Hiwassee River and south of that river, and having answered in the affirmative, he was asked about a certain corner and certain maple tree marked "W. D. R. 21" on the south bank of the Hiwassee River. He answered that that tree is still there and had recently been re-marked. The W. D. on it. That it was [illegible] from the 39th mile tree to Stick Knot, by being employed by the Attorney General of the State of Tennessee. That he was familiar with the Cession Act of the State of Tennessee, the report of the Commissioners and the map of 1821.

That Hall and Mercer were with him and that they used a compass. That he ran in eleven days on the south and three days more in 1870. That he ran the line from Lavender Fork by McDaniel Field to Stick Knot and also by the Stick Ridge.

That from the Colquitt tree on the river to [illegible] Ore mine [illegible] he [illegible] that he did in running this line and, on [illegible] other things, cabined [illegible] Parsons Field and there [illegible] his instrument and found that Calder Stack was

to the right and Hangover to the left of his line of sight; and on 1,409 that he then determined that the line was to the left after leaving Tennessee River. That his first impression was that the line would more nearly fit Hangover, and arose from the fact that his line of sight was to the right of Hangover and to the left of Fodder Stack, and he thereupon decided that Hangover was the true line because the map seemed to show that the line was on a ridge and that it could not fit any other ridge. That he thought that ridge parallel to Cheoah.

Hale pointed out to him the points claimed by North Carolina on their line and the points claimed by Tennessee, and he was told that North Carolina claimed that the line ran up Slick Rock Creek for some five miles, and Hale pointed out the spur running down from Fodder Stack to that point on the creek. That Hale also pointed out Little Slick Rock and several other notable objects on the south side of the river. That he stayed at that point looking for quite a while.

The next day he crossed the Tennessee River and started from Hangover Ridge and went to the junction and then down the Fodder Stack Ridge as far as Glenn Gap. That while going from the ridge leading to Hangover, he kept up his observations and could not see why, if the commissioners went up Slick Rock Creek for five miles, they should show only 1½ miles of the creek and omitted the Little Slick Rock Creek. That would show they were on a ridge from about two miles from the river, but that the abrupt turn six or seven miles south of the river seemed to show the contrary, and he had control that a good deal. That the map does not conform to a line five miles up the creek, and that Hangover was the only ridge he could construe as the main ridge. That from the north side it seems a much higher ridge, and thereupon he selected it as the nearest main ridge to tree 29.

That on the north side of the river he found tree marks 58 and 58 and 59, and some only fourteen to sixteen years of age, and on 1,413 he says the line north of the river has been evidently marked more than once.

On page 1,414 he says to take the shape and alignment

alone of the line from the map of 1821, it would not conform to either line, but would more nearly conform to the Slick Rock line, but for the shape of the line it conforms more nearly to the Hangover line, that is taking the topography shown on the map and everything else except the shape of the line, it conforms more nearly to the Hangover line. That the map indicates that there was a ridge to the right of where they went up, but that he applies it to the ridge from Hangover to the mouth of Slick Rock Creek.

On page 1,415 he says that at the end of two miles the 1821 map shows they were on a ridge and not running five miles up a creek, and he then goes into the question of the general trend away from the creek as it is depicted on the 1821 map. On 1,417 he says if he were running up a creek that he would not note the creek. On 1,418 he still compares the creek as shown on the map of 1821 with the line as claimed. That from Hayo to Cheoah the nearest point is 1 1-2 miles. That he has not been up Slick Rock Creek. That according to Burns' map Exhibit "D," Hangover is about three-quarters of a mile east of the head of the left prong of Slick Rock and that the angle of Slick Rock and Tennessee River more nearly represent Cheoah. That the extreme south line of the map of 1821 is seven or eight degrees different from the north line, but that would make no difference in scaling angles, but states that no one can scale bearings on the 1821 map accurately.

On 1,423 he describes the variations in the magnetic compass, and speaks of the difference between the true meridian and the magnetic meridian as variable quantities. On page 1,423 he says that a surveyor could not make an actual survey from the map of 1821. That considering all things, he never came to a positive conclusion as to the true line, but could never see that the Commissioners could have done anything else than go over Hangover. That from the face of the map and the reading of the report, if he had to decide, he would locate it on Hangover, but would be open to conviction; but thinks Hangover is where they went because it is the most direct way. On page 1,424 he gives as another reason that the plat shows that they crossed the river on the same

line as they ran to the river, hence he thinks they must have gone directly across. On page 1,425 he says that in going around Tellico, Burns' survey would not comply with the Commissioners' report.

On 1,427 that the straight line to Slick Rock on the map of 1821 is south 69 deg. west. That from the 58th to the 65th mile the course is south 47 1-2 west and then states that no man in twenty-four hours can determine where that line ran. Burns crosses the river at about south 45 deg. west. That from the 59th to the 61st mile between the actual survey and the line on the map of 1821 there is a difference of 19 2-5 poles and 36 poles in three miles. From the 61st to the 62d mile 16 3-5 poles. He then explains the discrepancy again on the extreme south line.

On 1,432 he says that platting from one point to another, or measuring around the meanderings would throw the line out. Would be all out of line. That the average discrepancies on the map are 25 to 30 poles. That the course north of the 59th mile tree on the 1821 map shows a straight line for a mile. He says taking the top of the mountain at the Tellico neighborhood and following the divide of the waters, it would lead you around by Beaver Dam Bald, Jenks Knob, Tipton Knob, McDaniel Bald, Cold Spring Gap and Laurel Top; that is around the headwaters of Tellico. That the wording of the commissioner's report, to the main ridge would mean that they would take the shortest line to that main ridge, and that the marks are very rapidly disappearing. On page 1,433 he says he never found any State line trees on Hangover that he was satisfied were State line trees. On 1,434 that he does not think it practicable to count the growth of the sourwood. On 1,435 he describes the lower part of the State line ridge and states that he found the 56th mile tree, but found no State line trees between that and Jenks Knob. He says that he found some marks along the State ridge, but marks which he thought were more recent marks. That he did not search very thoroughly because Mr. Hale told him that it had been blocked so extensively that there was nothing left that resembled a mark.

On pages 1,437 and 1,438 he gives certain elevations and

states on 1,139 that it would take a week to make the 1821 map. That it would take twenty working days to survey 51 or 52 miles south of the river and that the whole line could only be accurately surveyed in thirty days.

On 1,141 he speaks of tree 30 and states what he did in connection with Hale and McNab in blocking it and what he found. That in the block they took the marks were 58 years old, but on 1,153 says that it was remarked in 1852 or 1853 and that would have obliterated the old marks, and that the old marks are hacks without any blaze, and gives certain reasons why there is no blaze there 88 or 89 years old. On page 1,146 he says the map of 1821 shows the line around Tellico.

On cross-examination, 1,147, he disclaims any knowledge as to whether he could go around Tellico and reach the marked 101st mile tree in that distance or not. That he guesses it would be further and that the report indicates that they marked the line and taking the distances alone, it indicates that they did not go around Tellico. On 1,148 he says that if the line was marked on State Ridge and if he considered the holly the 86th mile tree, and the distance by the State Ridge was 101 miles to the 101st mile tree, these would indicate the Commissioners ran up the State Ridge line and if there are no marks on the line claimed around the head of the river, that would confirm it. That he does not know whether you could reach the 93d mile tree otherwise than by State Ridge or not. That taking the shape of the line and the angles they do not indicate that the Commissioners went around Tellico. On 1,150 that the shape of the line conforms to the North Carolina contention, and that if the shorter line conformed more nearly to the measurements it would show that the Commissioners took that shorter line. And the Commissioners' report says that that plat shows the line. On 1,151 that Hangover Peak is four miles from the river and that they were eight days on the Slick Rock part of the line, but that this witness did not survey any part of the line south of the river, and in their surveying they used a compass. From Parsons Bald to Long Pine is south 12½° deg. west. That he did not find any 64th mile tree; that it is 225 2-3 poles from the Long Pine to the river. From the

59th mile tree to the river following the meanderings of the ridge is 5.54 miles. The bearing to Hangover is south 14 1-2 west. That when he sighted southwest as he stated in the beginning, his line of sight struck Big Fodder Stack near Rock Stack, crossing the Slick Rock Creek. This point by Burns' map would be 13,500 feet from Hangover and 4,000 feet from Fodder Stack and seems to be within six or seven hundred feet of the line as claimed by North Carolina. On Hale's map the point would be half a mile from Slick Rock Creek and 2 1-2 miles from Hangover.

On 1,457 he says running southwest, if you struck any stream it would be Slick Rock and you could not reach Cheoah on that line. If you had reached the mouth of Slick Rock Creek and then went seven miles south 14 1-4 deg. west, you would very nearly strike the top of Big Fodder Stack. From there south 29 east three miles you would hit the Junction. "I don't know whether I would have shown Cheoah on a map of this kind or not." Such maps are not intended to be accurate topographical maps. The Slick Rock Creek is inaccurately located. On 1,460, that no other stream than Slick Rock comes in there. Just opposite tree 29 there is a bluff nine hundred feet high. On 1,462 he describes the looks of Hangover and states that you would look down considerably on the bluff when coming from the north; and on 1,463 gives elevations.

On 1,464 he says Cheoah is about at right angles to Slick Rock and at an angle of 60 or 65 to Hangover. That if you followed Cheoah you would be going further away from Hangover and Slick Rock all the time, and that its mouth is the nearest point. That the bluff on the other side opposite tree 29 extends from Slick Rock to the mouth of Cheoah.

On 1,465 he says the fact that I have made up my mind from observation that the Hangover was the main ridge, was one of the controlling factors in my mind in locating the line. Another was the sighting as previously described. That Slick Rock Creek is sketched inaccurately. That on the map of 1821 one-hundredth of an inch would be 132 feet, and that such minute distances could not be shown on the 1821 map. On 1,467 he says if a mistake was made in an angle and he

got off the line, if there was some object that he knew was on the line, he would correct it. That would be customary. That if Hangover is the line, following a stream for any distance would be irreconcilable with it. That he does not know of any stream for an equal distance running so near the State line, whether it is on Hangover Ridge or Slick Rock Creek, as Slick Rock Creek does. That the straight extreme south line straight to Georgia on the map of 1821 is undisputed and does not follow a ridge and crosses one or two little streams not mentioned in the report.

On 1,469 he says that taking the map of 1821 with the indication on it, that if he found a marked line up Slick Rock and the spur and from Big Fodder Stack and no marks on Hangover, that those facts would be a controlling factor and indicate that the Commissioners went up Slick Rock Creek. On 1,470 the words crossing at the 65th mile would land you on the south side of the Tennessee River. That the words "from the Tennessee River to main ridge" indicate that when you got across the Tennessee you were not on the main ridge but have to go to it. That blazes and marks generally may be imperfect.

On page 1,471 he says, "I counted 88 or 89 years on Burns' block from tree 30."

On 1,473 he speaks of the Thomas North Carolina grant. He states that the 64th mile tree from that grant seems to be 60 poles north of the river and from the 64th mile tree to the south bank of the river is 1,655 feet, which he corrects however to 1,305 feet; that is on account of the small scale of the map of 1821. He states that that distance of 3,725 feet, even upon the same scale of the map of 1821, could have been easily shown, to which the witness answers, "Yes."

Counsel on this re-examination asks certain distances and certain questions about the width of the river, the precise object of which does not seem apparent, except that in going southwest of the river. Counsel seems to be seeking to stretch the end of the 64th mile to the black oak tree. And it is stated that according to these measurements the 65th mile tree would be 2-5 of a mile south of the river, and on 1,474, for the first time in the history of this litigation, tries to show

by this witness that there is no bluff across the river from tree 29, but a little level land in there and that the words "to main ridge," the significance of which he seems to conceive as meaning that the line crosses that little level strip, now for the first time discovered, and that the ridge itself [on 1,475] he seeks to show does not commence until you get about 3-8 of a mile south of the river.

On 1,475 he said: "My line of sight as originally mentioned, does not fit either contention, nor the line as shown by the map, the line straight to the mouth of Slick Rock Creek, which is south 69 west. That the seven miles just south of the river, if prolonged on the angle of that line would reach Citico. That for seven or eight miles from the mouth of Slick Rock Creek the line as shown on the 1821 map is south 37 west. That Burns' map and the map of 1821 do not agree and it is very difficult to pick out any point on the 1821 map and locate it on the ground, because of the smallness of the scale, because the points we know, note and show on our plats are not shown on the 1821 map.

On 1,477 he says that "If I was absolutely sure of State line marks on Slick Rock Creek, they would control me." On 1,478 he says, "The creek more nearly represents Cheoah."

The description is then read to the witness of the Cession Act and the North Carolina act confirming the report of the commissioners, and the witness says that according to that he would have gone to the mouth of Cheoah and thence up the ridge from there to the Hangover two miles back. He then gives certain courses from the 59th mile tree, and on 1,483 says he has never been able to reconcile the map of 1821 to either the Slick Rock or the Cheoah, and that neither of these could be seen from the Hangover Ridge. That he could not reconcile that plat with any stream in that neighborhood. That the Ocoee plats were often inaccurate, and that the bearings of the map of 1821 were evidently taken from the magnetic meridian.

This witness is examined again commencing on page 1,544 with reference to the Davenport field notes. He states that he made a survey according to these notes from the 59th mile

to the 72d mile and found himself on Citico, three quarters of a mile west of Fodder Stack. He also surveyed from the 101st to the 86th mile and landed three-quarters of a mile from the 86th mile tree. That he found a south line about 5 deg. west. That he also surveyed one mile back from the 59th mile according to the calls of the Davenport notes. The calls of the Davenport notes from the 86th mile to the maple at Hiawassee have been read to the witness, and the calls from the 72d to the 86th mile, and the witness states that he platted the Davenport notes on a copy of Exhibit "D" and compares the Davenport notes with the Burns survey. On 1,556 he states that the end of the mile line on the Burns map to Slick Rock is 1,600 feet from the mouth of Slick Rock, and that the end of the 65th mile is 2,214 feet from the same point according to the Davenport notes nearly west, and that the Davenport notes took him to the Tennessee River, 1,617 feet from the 64th mile, so that 2,800 feet of that line would be south of the river. This copy of Exhibit "D" with the Davenport notes platted on to it faces page 1,556.

From the 59th mile tree to the Big Fodder Stack with the line as claimed by North Carolina, he took from Burns' notes. And on page 1,559, Exhibit "BB," which is the plat above mentioned, is filed. That the streams on that map are pretty accurately platted, but between places only sketched in, and states that on that map he has represented the main mountain and the lead to Hangover from the river, or the Hangover Ridge.

Defendant's Exhibit "CC" is here introduced, and attention is called on 1,562 to a mistake in the Davenport notes between the miles 71 and 72. That there are many discrepancies between the 1821 map and the Davenport notes, and he enumerates thirty-nine of them.

On 1,566 he continues the comparison, and on 1,567 states that the map itself shows the error of notes between the 71st and 72d mile. Also between the 95th and 96th miles. That the Commissioners' report differs widely from the Davenport notes. On 1,568 he says the notes do not say "running with the top of the mountain," and attention is called to the United States map.

On 1,571 he says Hale was with him on all of his surveys and worked with him. That the Davenport notes north of the river do not tally with Burns' survey. That on Burns' map the 65th mile ends 136 poles west of Slick Rock, and on 1,574 he continues to detail the discrepancies between the creek and Burns' survey, and states that according to the Davenport notes, at the end of the 70th mile they were 1 1-2 miles from where the North Carolina contention shows the line left the creek. He also shows then the running of the line at the Tellico River neighborhood, according to the Davenport notes, and states that they allowed five degrees variation. In other words, testing by the true meridian, while the magnetic was used by Davenport.

He states on 1,575 that tree 30 showed blazes back to 1823. That it was six or seven feet from the bank, and for the first time now, it is tried to be shown by this witness that sometimes there might be two growths to a year, but the witness said he had never found it so. The witness is then asked about Deever's maps, Exhibit "FF" and the "66" United States maps. On 1,578 the witness is asked certain questions about McDaniel Bald and the Cheoah Path, in an effort apparently to fit Cheoah Path and the turns in Hangover to the path and turns of the line as North Carolina claims it.

On 1,580 he speaks of the Deever's map of 1837, and on 1,581 states that the streams are sketched in Exhibit "66" on the government map.

The cross-examination commences at 1,582, and he states that he used the Davenport notes with five degrees variation; and on 1,583 details how he made use of such notes. On 1,584 he says he did not hunt for objects mentioned in the Davenport notes, and on 1,586 that he did not record, or even hunt for any of the trees mentioned in the notes, and that he platted and tested Burns' lines in the same way. That the 59th mile tree is a scarlet, not a red oak. That he found the Equoneetly Path. On 1,588 he says he discarded the map and path and discarded natural objects. That by the notes they call for the mouth of the creek. That he could not find the marked trees from the 59th to the 64th miles and that he

did not come to the creek with the survey. That was a departure from the calls, and that he knew exactly where each mile ended. That he knew the North Carolina contention went up Slick Rock Creek, but he did not survey it.

On 1,590 he says in a long survey like that, you cannot expect courses and distances to come out right. That it was not a natural way to test a survey and that he could not expect his comparison to come out right, and that if he were to go out there today and be shown those lines of the trees, he would say that they could not have gone along that line platted in red, or the line platted in green. And from here on he corrects many of his mistakes and the discrepancies heretofore mentioned in 1,591. He says these notes must have been the record of some survey. They could not come from the imagination. That the survey must have been made rapidly, and on 1,592 he describes the character of the country and he says, "In following these calls of the Davenport notes, I would consider it necessary to cross at the creek." On 1,593 he says that the notes indicated that the surveyor was going the general turn rather than getting every minute detail.

On 1,594 he says, "My observation upon the ground was what determined my belief, and not the notes." "I do not say that the Davenport notes cannot be made to fit the North Carolina contention. They would not show the Tennessee contention. The notes on the North Carolina contention cross the creek at its mouth. The Tennessee contention does not." That the Tennessee contention goes just in the opposite direction from what the notes indicate, and the Davenport notes more nearly fit the North Carolina contention.

On 1,595 he says that the Deever map turns to the left in the first mile, and in the North Carolina contention it turns the same way. That the Deever map in the first mile turns to the left, and in the first ten miles the North Carolina contention turns the same way. The Tennessee contention just in the opposite direction. That Deever's map is not correct as to either North Carolina or Tennessee contentions. The Deever map follows the mouth of Chocah for 3.44 miles. That the blue line on the "GG" Exhibit from below the mouth of Chocah to the Deaver western line is three-quarters of a

mile, but on Deaver's map is three miles. That you would have to move the line on the "GG" exhibit more than an inch.

On 1,597 he says that the 64th mile tree on Burns' map should be 3,095 feet back of the hemlock, 275 feet north of where he located it. From there to the mouth of Slick Rock would be south 89 west; leaving out the allowance of five degrees would be south 84 west 1,470 feet. That he found marked trees from the 59th mile to the river (record, 1,598), but that even on the north he found many State line trees with only fifty-eight years growth, but that nobody questioned the line along there. There were old trees there too to indicate the lines, and the 64th mile tree would be further back. That Burns shows one mile to Slick Rock. That if a survey was to be made there, they would sometimes take a single course for a mile and sometimes for half a mile. That the running and marking would have to be around and not following the course of the compass. That the marks there are sufficient to show that the marking was done around the mountain tops.

That Deaver's map was evidently just sketched in, which means put in from the surveyor's ideas, and is not very accurate and in fact may be very inaccurate. That the divergence of five degrees from the Davenport notes and the map, would be very slight with reference to the termini, and the witness is taken over the divergence again.

On 1,602 it would seem that the copies of the notes that were given to this witness were inaccurate; there are several of these discrepancies. That on pages 1,603, 1,604, 1,605, 1,606, 1,607 and 1,609 continuous explanations are made of these discrepancies and admission of errors made by the witness. On 1621 it is apparent that the man who made the map of 1821 and the man who made the Davenport notes had information of the same survey; the general outlines are alike and the courses and distances practically one set. In the main they are the same, and he says: "I think that by very careful work, the field notes could be made from the map itself, which would make another map which would very closely resemble it.

The defendant's next witness was

O. W. MULLER,

who testified in the Hebard case. This original testimony is found at page 1,368 of the record.

He was surveyor of Polk County, Tennessee, and was with Hale and Wilson on the original survey in about 1897. He says he was employed by McCroskey and Seymour to make that survey. That they crossed the river, examined all the ridges that could possibly be called a continuance of the main ridge on the north side, and all spurs leading to the prominent ridges on the south side. That they found no old State line marks on any of these near the river and that they ran their line on the most prominent ridge, running to what is called Slick Rock Gap, because it fits the description of the report of the Commissioners; that is on the Hangover Lead.

On page 1,369 he says the topography of the country determined their selection of this lead. Standing on the summit of this ridge and looking back over the ground, the continuance of the leading ridge seemed so plain that there seemed no possibility of mistaking the identity of the formation. It looks as though the river, impeded in its course, had burst through the mountain, worn down a rocky chasm, leaving the same configuration on both sides of the river; the course is southwesterly, and the general elevation is greater than the surrounding ridges. None of the other ridges look like a continuation of the ridge on the north side of the river, on which the marked State line is found.

On 1,370 he says there are many marked trees on this line and mentions the sourwood. They ran the line to Hiawassee. On 1,372 he says they found old marked trees on Slick Rock line, but the Hangover is undoubtedly the main ridge, and tells why, but the reasons given are the reasons that have been heretofore given by other witnesses.

On the Bill of Review, he testified with reference to the map of 1824, commencing record 1,368, that they could not fit the map to the territory, and then on 1,370 states what efforts they made to fit. He states that the map indicates that it crosses the river at right angles and they could not fit

tue ridges. That the shading indicates that they were running on the ridge. None of these ridges would fit the map. That Chesah River is a mile and a quarter from tree 29. On 1,273 he says that persons going through that country unfamiliar with it, would naturally take the spur down to Chesah. That Hangover is the most prominent ridge, but that you have to go down to Chesah to cross.

That Burns' map shows the State line on the north side correctly, but they could not locate the line on Slick Rock Creek from the map of 1821, that no line is shown on the map running up the creek for five miles. Indications are to follow the ridge.

On 1,276 he says that Chesah runs almost parallel with the Tennessee River apparently, and that if you did not know that Chesah was there, you could not see it. That they only went a mile north and in his opinion the Unaka is the highest ridge. That the courses of the map of 1821 are not such as they can lay down on the mountains. The map shows that they run on mountains. That that map shows that they crossed at a water course, and it must be either Slick Rock Creek or Chesah; and that the map does not show that they crossed a bluff. That by the map of 1821 you cannot locate the line. On page 1,288 he says he found the map of 1821 was incorrect in all its bearings and distances, and he paid no further attention to it; and this he could tell by the field notes of his own made before he saw the map of 1821.

He was again examined (record, 1,291). On 1,293 he says there were State line trees on State Ridge and that he found the holly, the sixth mile tree. That these were evidently made for State line marks, but were not on the line as ruled by the commissioners, and therefore he could not say whether they were State line marks or not. That the State Ridge is not a defined ridge after you pass Hiawassee until you approach Jenks Knob. He found the sixth mile holly and says it looked as if it was intended to be a State line tree, but was not on the ridge that he picked out for the State line and therefore he could not recognize it as a State line tree; it was near the Tellico River. He describes the ridge around the head of Tellico, showing that it had a good

many gaps and knobs, but says that no competent surveyor could mistake the main divide. That there are no State line trees on the ridge around Tellico, but he located the State line around the head of that river, on the main ridge.

On page 1,300 he says crossing the river at 65 miles means that they crossed it directly. On page 1,304 he says that the maps and field notes of the Ocoee and Hiawassee Land Districts were hard to locate. The maps and notes were inaccurate. He says on page 1,306, "I followed a marked line when it agrees with the natural objects." That he did not consider it possible to reconcile the plat of 1821 with anything in that country. That the rivers on that are wrong. They are just sketched in.

J. E. WILSON,

now dead, was also a witness as a surveyor in the Hebard case (record, 1,345). He was a surveyor of Maryville, Tennessee, and was with Hale on his first survey. He found tree 29, and the substance of his testimony is that it was the natural supposition that the line would go straight across the river. He describes the topography as it has been already described and the trees on Hangover about as Hale describes them, and mentions trees on the Fodder Stack. He says the Hangover Lead is the main ridge, and he thinks the Commissioners ran up that line.

ONLEY WILLIAMS,

on page 971 of the record, is not a surveyor, but he was with one of the surveying parties. He says he found State line marks right smart below the mouth of the Chocah, and thinks Hangover shows up better from the north, and from the shape of the stream marked "creek" on the 1821 map, that it must be Chocah.

H. M. KENT, a surveyor. (Record, 1,489.)

This witness might be treated as a negligible quantity. Crisp, one of complainant's witnesses, record, 563, says of him that in May, 1910, he appeared on the ground represent-

ing the Babcock Lumber Company, and that he sighted from the north side backwards and forwards with a straight stick. That they had no instrument with them. They then went on to the south line of the river, inspected Slick Rock and Big Fodder Stack, and that they made up their minds that the line ran up Slick Rock and Big Fodder Stack, and he said he would so report.

He denies this on page 1,495 and says he was mainly looking for the main ridge, and that Hangover appeared to be higher and bigger than any other, and that he could not get it out of his head that Hangover was the main ridge, but admits that there were State line trees on the Slick Rock line. Subsequently he says (record, 1,505), that at first he thought Little Fodder Stack was the main ridge. That the map of Burns and Gannet seemed to be right in courses and distances from Knob to Knob, but on the whole (record, 1,501), the most reasonable and probable route seemed to be to cross the river at tree 29 to the top of Hangover and from there to the junction. Moreover, he says Hangover goes down gradually to the river and is very much broken.

This survey, such as it was, was made in May, 1910, and his testimony was taken January 7, 1911. He was asked (record, 1,510) what report he made, and did he report that it went over Hangover. He says: "I reported to him (Mr. Shields) what I found."

The question is repeated:

Q. "Did you report that it went over Hangover?" A. "I think I told him I thought so. I wrote my opinion." He gives no further light, but simply emphasizes his failure of memory in his answer to question 175, by saying that he must have reported in favor of Hangover because he must have reported what he found.

C. B. McNAB (record, 1,516),

is not a surveyor. His experience of tree marks was very slight. He never did any blocking. He says the marked trees are a little short in measurement.

On page 1,525 he speaks of the tree No. 30. He was impressed with the idea that Hangover was the main ridge.

That the blaze on tree 30 was only fifty eight years old. That Burns' block shows four hacks. Nothing to indicate a blaze; only a dead spot on one of the hacks, and thinks that that would not indicate a blaze, but it might if the hacks were not there.

ANALYSIS OF THE EVIDENCE.

In considering the force of the evidence in this case, the subject matter divides itself into several important and controlling circumstances, which will be separately discussed.

(1) In the first place comes the Cession Act of 1789, whereby the State of North Carolina, by act of its General Assembly, ceded to the United States the territory, including the part in controversy, and the territory out of which the State of Tennessee was formed. The act of February 6, 1796, of the State of Tennessee, being section 32 of the Declaration of Rights; the Acts of North Carolina and Tennessee, respectively of 1819 and 1820, whereby the two States appointed Commissioners to fix the dividing line from the Catalouchee Turnpike Road, southwest; the line to the Catalouchee Turnpike to the northeast, having been previously located. The Acts of November 9, 1821, passed by the State of North Carolina, and chapter 33 of the Act of 1821 passed by the State of Tennessee, confirming the acts of the Commissioners and adopting and confirming the line located by them.

(2) The acts of the Commissioners under the agencies of the two States, authorizing them to run the line, consisting of their report and the map designated throughout the record as the map of 1821, which report and map were filed at the time with each of said States at their respective capitols.

(3) The topography of the country at the localities in dispute.

(4) The surveys that were made in the interests of each party.

(5) The Davenport notes.

(6) The marked lines.

(7) The prevailing tradition or traditions, with reference to the State line.

Taking up these in their order, we find that the Cession

Act also gives the property called as lying west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it. Running thence along the extreme height of the said mountain to the place where Watauga River breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same. Thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek to the place where the road crosses the Iron Mountain. From thence along the extreme height of said mountain to where Nolichucky River runs through the same; thence to the top of the Bald Mountain. Thence along the extreme height of the said mountain to the Painted Rock on French Broad River. Thence along the highest ridge of the said mountain to the place where it is called the Great Iron or Smoky Mountain. Thence along the extreme height of the said mountain to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota. Thence along the main ridge of the said mountain to the southern boundary of this State, to wit, the State of North Carolina.

On page 81 of the record, is the substance of the Act of North Carolina passed in the year 1819, providing for the appointment of the joint commission and defining the duties of the commission to "settle, run and mark the boundary line between this State and the State of Tennessee, agreeably to the true intent and meaning of the Act of the General Assembly of this State, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described.'"

In the second section of that Act, it is provided that the State will at all times hereafter ratify and confirm all and whatsoever the said commissioners, or a majority of those of each State, shall do and in touching the premises, and the same shall be binding on this State. And further in section 3, providing as follows: "And the commissioners on the part of this State shall cause an accurate plan of said boundary line to be made, specifying the courses, and distances, natural

and artificial marks thereof and return the same to the General Assembly of this State."

The substance of the Tennessee Act is contained on pages 82 and 83 of the record, and the third section of that act is in these words: "Be it enacted, That whatsoever the said commissioners or a majority of those of each State, shall do in and touching the premises, shall be binding on this State."

On the 31st day of August, A. D. 1821, the Commissioners under their individual names made their report and filed their map, making a report to each State. This report to the State of Tennessee commences on page 83 of the record. The report and map and all other papers connected with this survey that were filed at Raleigh, presumably have been destroyed by a fire which consumed the capitol there in about 1832 or 1833, and so far as we have been able to find, those particular papers are not in existence.

In making this report on page 84, the Commissioners say that, "we proceeded to ascertain, run and mark the said dividing line, as designated in the 11th article, called the Declaration of Rights of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described, passed in 1789; which said dividing line as run by us, begins at a stone set up on the north side of the Catalouchee Turnpike Road, marked on the west side Ten. 1821, and on the east side N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes the Tennessee River, about 7 miles above the old Indian Town of Tallassee, crossing Porters Gap at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles; the Equonettly Path at fifty-three miles, and crossing Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near

the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road, where a corner stone is set up marked Ten. on the west side and N. C. on the east side, and where a hickory tree is also marked on the south side, Ten. 101 M., and on the north side N. C. 101 M., being 101 miles from our beginning."

This seems to be the only part of the report that it is essential to quote with reference to the line itself, but the report adds, "The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; agreeably to the plats which accompany this report, and which said plats and reports are certified by us in duplicate, one for each of said States, in the same words, marks and figures."

On page 86 of the record is contained the Act of the General Assembly of North Carolina, passed in the year 1821, confirming the boundary line as run by these commissioners, describing it exactly as it is described in the report, and adding, "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile."

In considering these Acts, under the authority by which the Commissioners acted in locating this line, the first thing that strikes one is that at the time the line was so undefined, it was impossible to locate it by Legislative act. If it had not been, there would have hardly been any necessity of a joint commission. There must have been more or less of uncertainty as to where in fact that line was located. The very fact that a commission was appointed and that both acts provided for the case of a difference of opinion among the Commissioners, shows pretty conclusively that there was, or might arise, a ground for such difference, and secondly, that in cases of such differences, the Commissioners were to choose within the general directions and limits and fix where the true line was, and that that difference of opinion might be serious; whereupon it was provided that the majority of the Commis-

sioners of both States should settle it, and when it was settled in that way, by both acts, the States had agreed to be bound by it.

It is entirely illogical therefore to argue that these Commissioners had no discretion whatever in the matter; that they were bound to settle the line along the top of some ridge. That they could not leave the ridge even for a temporary purpose in getting to some other point; and that if there was no ridge that was appropriate directly in the line (that southwestward line) that then they must hunt one. The rigidity of such an authority would remove all idea of any discretion whatever, even though it might have been an exercise of discretion unanimously, and even something that was necessary. Yet they were bound to follow the extreme top of some ridge. That such is the effect of the acts is manifestly wrong, and much more it is manifestly wrong to claim, not only that the commissioners were rigidly confined to the extreme height of a ridge, but that it must be such ridge as in the opinion of the surveyors living in the State of Tennessee and employed by the State of Tennessee, was the ridge that they ought to have chosen. We say this last because we think it will appear that the surveyors on the part of the State of Tennessee followed the original surveyors, the chief of whom was W. D. Hale, who commenced his surveys in 1896 for use in the Hebard case, and has been with every subsequent surveyor who has undertaken to run that line on behalf of the State of Tennessee since then and has evidently dominated each surveying party that he was with, and it will be found that he openly avowed that the topography of the country determines the locality of the line in his mind, and that it was so because in his opinion certain ridges were main ridges and the ridge that the Cession Act intended the commissioners to follow, and which therefore they ought to have followed.

If the Legislatures of the respective States had any doubt about the true location of the line and of the ability of the Commissioners to locate it by the mere inspection of the topography of the locality, and if by the law authorizing the joint commission it is sought to obviate that by empowering a majority of the Commissioners to locate, settle and mark

the line, those doubts and that authorization would seem to have been justified by what has been developed by the evidence in this case.

Assuming that all of the expert witnesses are equally honest and equally capable, the difference of opinion that has arisen would indicate that there is ample ground for an honest difference as to which is the main ridge southwest of the Tennessee River and where the Commissioners ought to have located the line, and where the most natural locality of the line would be in the judgment of the Commissioners, reasonably following the requirements of the acts of the Assembly. And the agreement to ratify and confirm whatever the commissioners might do in the premises, emphasizes the fact that there was an essential discretion to a certain extent left to them and their unanimity in adopting the wording, "locating, settling and marking the line" shows that there must have been some consideration in the fitness of things, which induced them to locate it where they did, and if we can only locate that line that they did in fact run, then we have the thing that the Legislature ratified and confirmed.

This view of the situation, as foreshadowed in the laws, and the evident purpose of the appointment of the Commissioners, becomes important, because as we proceed it will be found that W. D. Hale, an expert witness for the defendant, who dominated all of the surveys that were made in its behalf, undertook to put his own interpretation upon the Cession Act and acts providing for the appointment of the Commissioners, and located the line almost entirely from the topography of the country and his own opinion as to which was the main ridge south of the river, and not so much where the Commissioners in fact did locate the line, but where in his opinion they ought to have located the line and endeavored to make everything else conform and be subservient to that opinion of his, formed at the start.

COMMISSIONERS' REPORT.

Looking to the report of the Commissioners of 1821 (record, 83 and 84), and without the aid of any plat or field notes filed with it, we learn in the first place that they assembled at the town of Newport, in the State of Tennessee, on the 16th day of July, A. D. 1821, to settle, run and mark the dividing line between the two States from the termination of the line run by McDowell, Vance & Matthews in the year 1799, to the southern boundary of the said States.

They made their report at Knoxville on the 31st day of August, 1821, so that a period of about six weeks was occupied by them in getting to and from the localities, making surveys and making the map. This survey is shown further to have commenced about sixty-five miles northeast of the Tennessee River and continued to the southern boundary line of the States of Tennessee and North Carolina, a distance of over one hundred and sixteen miles.

The evidence in the case on both sides shows that that was too short a time to make a strictly accurate survey. The time consumed in getting to the extreme northeast point of the line and back to Knoxville from the southwest part of the line must have been a week or more.

Williams, one of the defendant's principal witnesses (record, 1,439), testified that would take a week to prepare the map, and making some allowance for Sundays and days when the weather would not permit work to be done, they must have spent on the actual survey considerably less than thirty days. If the time was scant to make one survey, it must have been much more inadequate to make two surveys.

The pertinency of this observation will be apparent when we come to discuss the evidence of W. D. Hale. This witness, who is defendant's principal witness, and who dominated apparently all of the surveys made on behalf of the defendant, because he was present with the surveyors and apparently in charge of them at every survey that was made for the defendant. His first survey was made with Muller and Wilson in 1896 or 1897. As we will discover, commencing on the northeast side of the river, when he arrived in

proximity to the river, he cast his eye over the territory across the Tennessee River from where he stood and made up his mind that the Hangover Ridge was the main ridge to the southwest of the river, and that inasmuch as in his opinion the language of the Cession and other acts confined the Commissioners to the main ridge and rendered them powerless, even for short distances, to leave the crest of the ridge, no matter what consideration may have moved them, he concluded that the Commissioners had no power to go any place else and that therefore in fact they carried the line over Hangover Ridge, because they ought to have done so.

He is forced to admit, as we shall show further along substantially, that the Commissioners did make a survey up Slick Rock Creek and over the Big Fodder Stack, and below they made a survey over the State Ridge in distances of in the aggregate of fifteen miles of the most difficult parts of the line, but that they abandoned these perplexing parts now in dispute, and casting their eyes over the Hangover Ridge and over the ridge around the head of Tellico River, passing McDaniel Bald, while they actually surveyed and marked both the Slick Rock Creek part of the line and the State Ridge part of the line, nevertheless, they mentally adopted the Hangover Ridge and the ridge around Tellico River as the true State lines.

It is sought to be shown that in the Tellico country they were deceived because they were in a fog, and when the fog lifted, and they found their mistake, they sent some parties back to obliterate the marks on the trees that had been made, and that after obliterating some of them, they got tired of the job and were also too tired to measure and survey around the headwaters of Tellico and therefore made the mental reservation already mentioned. But of this partial obliteration and of the fact that their report was accompanied by any such mental reservation, there is not one item of evidence.

The same claim practically is made with reference to the fixing of the eastern boundary line of the Ocoee Land District, which is fixed according to the map of that district at the Slick Rock Creek. The excuse made for not going further was that the country was rough, wild and uninhabited

and they were also too tired to measure around and survey the Hangover Ridge, but that, they just made up their minds, it was the dividing line. In other words, in each case the Commissioners in the one case and the Ocoee Land District Commissioners in the other case, instead of marking the line as it was intended to be located, fixed it in their minds, but made reports and plats diametrically opposed to these secret meetings of their minds.

Referring to the written report, the commissioners say that they proceeded to ascertain, run and mark the said dividing line, which they said begins at a stone set up on the north side of the Cataloochee Turnpike Road and runs thence a southwestwardly course and continues southwestwardly to where it strikes the Tennessee River, crossing Porters Gap at the distance of twenty-two miles from the beginning; Meig's boundary line at thirty-one and a half miles; the Equonettly path at fifty-three miles, and crossing Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unicoy or Unaka Mountain, striking the old trading path leading from the Valley Towns to the Overhill Towns, near the head of the west fork of the Tellico River and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road where a corner stone is set up, being 101 miles from the beginning; thence south two miles and a fraction to a spruce pine on the north bank of the Hiawassee River below the mouth of Cane Creek, etc.

Further along they say "the said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree, and mile marked at the end of each mile, agreeably to the plats which accompany this report, and which plats and reports are certified by us in duplicate," etc.

We learn further from this report that the Commissioners were apparently in the habit of noticing the gaps and paths and the more prominent streams that had any names.

In this connection we may remark that according to the testimony, on the northeast side of the river there are streams in close proximity to the undisputed State line which are not mentioned, and if the line as is claimed goes over the Hangover Ridge, there are three deep gaps, to wit, Big Fat Gap, Sourwood Gap and the Slick Rock Gap, which are not mentioned, and two peaks, the Hangover Peak and the Hayo Peak on the line as claimed by the State of Tennessee, between the Tennessee River and the junction of Hangover Ridge and Big Fodder Stack, which peaks are, with the exception of Huckleberry Knob, which is not on the State line as claimed by either party, the very highest peaks in that section of the country which are not mentioned. So then it is quite impossible to surmise what rule the Commissioners adopted in mentioning natural objects, and it is wrong to argue that if the Commissioners located the line at a certain place, they would have mentioned this, that or the other natural object which we know to exist, for we are utterly ignorant as to what considerations moved them in determining the importance, or non-importance, of mentioning a land mark or monument; and it would be quite consistent to find, especially where some stream had no name, that they had simply called it a creek, or omitted entirely to mention it. For instance, the two peaks mentioned, Hangover and Hayo, were peaks that would stand prominent for all time, and yet, according to the claim of the defendant, the line went right over those two peaks and past the three very deep gaps and not a word is said about any one of them.

There are two portions of this report that we should like to have the Court bear in mind. One is with reference to crossing the Tennessee River and from thence to the main ridge. These words would indicate that immediately after crossing the Tennessee River, they were not on the main ridge, but that they had to go to the main ridge and that that main ridge was a more or less distance (of course we know not exactly how much) from the river, and the pertinency of this will be apparent when we come to show that in the opinion of many competent expert witnesses, not only as to the meaning of that language in surveying parlance, but that on the ground itself,

the main ridge commences where the spurs, which are many in number, leading off to the river, going northeast, meet, to wit, at the point called the junction; and it will be quite apparent that the ridges which lead from that point toward the Tennessee River, are as numerous almost as the fingers on a hand, and may be likened to such fingers, and that if it is assumed to designate anything from that point to the river as a main ridge, or the main ridge, there would be a very great difference of opinion.

Some very competent witnesses claim that the Big and Little Fodder Stack form the main ridge, because they have a greater average bulk and altitude. Others claim that the ridge going northeast leading off toward the right towards the Chesah River and striking that river, is the main ridge, and it seems to be admitted that it does have a greater bulk and average altitude than that ridge which is called the Hangover Ridge.

Some witnesses say, with reference to the Hangover Ridge itself, that for two or three or four miles southwest of the river, it is not capable of being called a main ridge, because from a short distance northeast of the Hangover Peak it begins to drop pretty rapidly and drops gradually until it gets to the river, and for the first few miles it is very much broken by gaps.

The next language that we want to call to the particular attention of the Court is that part of the Commissioners' report which speaks of their proceeding to ascertain, run and mark the said dividing line, and in the latter part of the report where they say "the said dividing line, run by us in its whole length is distinctly marked." So that what we have to hunt for is a marked line, and if we can find that marked line, we have to a very large extent solved the difficulty.

It is not saying too much in this case to say that we are hunting for the line that the Commissioners actually ran and which they set out in their report and the map, and which is the line which was confirmed by the legislatures of the respective states, and it does not answer to look over the country at this day and to pick out where the Commissioners ought to have run the line, and assume that they

had no authority to do otherwise and that they actually did run that line so picked out, in the face of abundant and convincing proof to the contrary. If it were otherwise, then this Court would be called upon, not to find and relocate what was actually once located, but at this late date, to make a new location where Mr. Hale and his assistants are of opinion that the line ought to be. With due respect, there is no such question before the Court in this case. We are trying to find a line that has already been located, settled and marked, and with that object in view, we will examine the evidence and see whether there is sufficient to enable the Court to decide that issue.

TOPOGRAPHY.

Of course, when the Commissioners commenced their survey, they started at a point about sixty-five miles northeast of the Tennessee River, but so far as the looks of the country in that disputed locality are concerned, it only became apparent to them after they got beyond the 59th mile tree, which is in the neighborhood of six miles from the river, and is the undisputed point at which the expert witnesses commenced their surveys for the purpose of this case and the previous litigation between private land claimants.

In going down the crest of the Smoky Mountain, the Commissioners were going in a southwestwardly direction. They say so in their report, and the trend of the crest is according to that course. It is true that there is not a uniformity of course in all of the parts of this line, but for a distance northeast of where the 64th mile tree must have been, they are going on a course of about south 45 degrees west. The 59th mile tree is plainly marked with the figures 59 and M., indicating that the Commissioners report that they marked the end of each mile, is a description of what they actually did.

In going down the crest of the Smoky Mountain, when they get to a point where they have a clear view of the Tennessee River and the country on the southwest of it and approaching it in a southwestwardly course at the angle above

mentioned, they are looking straight at the Fodder St
Ridge. When they got to the point where the 6Ith
tree would be, about half a mile from the Tennessee Ri
the map in the case will show that they drew a straight l
from that point to the mouth of a creek, which they do
name, but which at the angle of South 75 degrees West co
be no other than the Slick Rock Creek, for there is no o
stream comes in at that point, nor anywhere near it.
approaching the Tennessee River, however, they marke
tree on a more direct course to the river mentioned as
No. 29, a hemlock, and then marked other trees, down
North bank of the Tennessee River and crossed to the no
of Slick Rock Creek.

In approaching the river, the Slick Rock Creek is
only stream in proximity to the line on the right, at a
stance of about half a mile down the river. The Che
River is about $1^1/_4$ to $1^1/_2$ miles to the left, and according
the witness Wilson, would not be visible in the summer ti
from the Hangover Ridge. The angle at which the Sl
Rock Creek runs into the Tennessee River is about a ri
angle, whereas the Cheoah River, according to Exhibit "
to the testimony of W. D. Burns, looks like a continuat
of the Tennessee River itself, and beyond that, what
really the Tennessee River, might, according to the plat, l
branch and not the main river; and it is apparent that
the line ran to the mouth of the Cheoah River to the left
went for any distance up the stream, it would be going ab
at right angles to both of the lines as claimed by the c
tending States, and the surveyors and Commissioners wo
be going further away from the line as claimed by eit
party at every step they took. Furthermore, the Che
River is too large and swift a stream to be crossed and
crossed by a surveying party, and even if the angle
South 75 degress West was a mistake, and should be So
75 deg. East, then according to the testimony of S. S. G
net, one of complainants' witnesses, record page 199, suc
line drawn to the East would not strike the mouth
Cheoah River, but would strike the dry land about a qua
of a mile away.

At a point on the same Northern part of the line there are ridges that go off from the Smoky Mountain. One of them, called the Lester Ridge, runs to the right and passes the mouth of Slick Rock Creek and the country between the end of the 64th mile and a point opposite the mouth of Slick Rock Creek on the Northeast side is very rough and practically impassable.

Another ridge goes off to the left and reaches or passes a point opposite the mouth of the Cheoah River, but on neither of these ridges passing to the right or left did any one of the surveyors find any State Line marks, with the exception of McNab, who claims to have found marks on the ridge leading to the left and striking opposite the mouth of Cheoah.

Looking from the end of the 64th mile across the river in the direction of about south 15 deg. west, according to the testimony you are looking right at the Fodder Stack Ridge. From the junction ten miles southwest of the Tennessee Ridge there is testimony that you have to go down from 500 to 500 feet to get on to the Fodder Stack Ridge, and that ridge in approaching the river shoots off a spur or minor ridge, which extends to a point on the Slick Rock Creek about five miles from the river, but the main ridge continues sheering off farther to the left and strikes the Tennessee River a mile or so below the mouth of Slick Rock Creek, and for a certain part of this distance it is called the Little Fodder Stack Ridge.

Just opposite tree 29 is a bluff rising straight from the river, about eight or nine hundred feet high, and for a distance of at least four miles, according to the testimony of the complainant's witnesses, the ascent is quite gradual, until you get into the proximity of the Hangover Peak and it is broken up by deep gaps, the principal ones of which are Big Fat Gap, Scrawood Gap and Slick Rock Gap. The two peaks called Hangover and Hayo, which are about half a mile apart, are very high, but are in the neighborhood of six miles from the river. Going over the Hangover Peak towards Tennessee River, there are two or more ridges that break off from the Hangover Ridge so called at different localities between the Hangover Peak to the river, one of

which runs from the so-called Hangover Ridge to the mouth of Slick Rock Creek. Another goes off to your right when coming in a northeast direction and strikes the Cheoah River some miles above its mouth, while from that again is another ridge that strikes almost at the mouth of the Cheoah River and seems a continuous ridge with the one heretofore mentioned as going off to the left of the 64th mile tree north of the river towards Cheoah River.

The bluff just opposite tree 29 extends along the south bank of the Tennessee River for quite a distance on either side, at least a quarter of a mile each way, and the river right there is impassable. A person desiring to cross the river right at tree 29 would find that he would have to go up as far as the mouth of Cheoah in order to make that crossing and come back.

Both Muller and Hale, witnesses for the defendant, state that strangers in the country desiring to cross the Tennessee River and eventually get on to the Hangover Ridge would naturally take the ridge on the north side leading to a point opposite the mouth of the Cheoah River, cross there and ascend the ridge which goes to the mouth of the Cheoah River on the south side and thence to the Hangover Ridge, reaching the Hangover at a point two or three miles from the river, and it seems to be agreed by the defendant's witnesses that the ridges leading up on the south side of the river to the mouth of Cheoah is really the commencement of the main ridge on that side of the river, rather than the so-called Hangover Ridge itself from a point opposite tree 29. There is a difference of opinion among the witnesses as to which is the main ridge on the south side of the river. Of course, this is not any difference between them as to what you see there, but an opinion as to which is the more bulky range, and therefore which is the main ridge.

The complainant's witnesses are of opinion from what they saw that for a distance of several miles from the Tennessee River on the south side the Fodder Stack range has greater bulk and average height, but the defendant's witnesses, basing their opinion largely on the superior altitude of the two peaks mentioned on the Hangover Ridge, think

that that is the main ridge, although they admit that the part that goes off toward the mouth of Chocah River on the south side of the river is the main ridge from the point where it starts apparently away from the Hangover Ridge to the river going in a northeasterly direction, and if strangers would take that route, in order to reach the Hangover at some point southwest of the river and thence reach the junction, it is hard to see why the surveyors who first went there, who were strangers to the line, would not do the same thing.

Others, and among those others, Gunter, Bogle and Hyde, (Record 197, 824 and 844) are of the opinion that the main ridge mentioned in the report of the Commissioners commences at the Junction, for after you reach that point, it is practically one ridge; whereas, to the northeast of that and approaching the Tennessee River, the ridges spread out like the fingers on a hand, and that the very fact that there could be so much difference of opinion as to which is the main ridge, in which the Commissioners must have shared, led them to select the junction as the commencement of the main ridge; and that is why the Commissioners in their written report used the words "from the Tennessee River to the main ridge," rather than "from the Tennessee River along the main ridge."

The main ridge was not known as the Unaka Mountain right at the main ridge (See stipulation Record, 782) and was not known by that name until you reach a point about five miles further, or in other words, about fifteen miles from the river. Witnesses for the complainant viewing the premises thought that the most natural selection by the Commissioners, as they must have been looking directly at it, would be the Fodder Stack Range, and that the method of striking the creek and going up the creek about five miles to the ridge and thence to the Fodder Stack was the easiest and most natural way of getting to that main ridge. So that the topography at this point does throw some light on the question, but different surveyors, all equally familiar with the topography, and we assume equally honest and competent, draw different inferences, and, if the Commis-

sioners were in the same plight, and we are bound to assume honestly, took a certain course according to their best judgment, and that course as reported, mapped and marked was confirmed by the legislatures of the two States, who can complain, or who can even say that they ought to have judged for instance as Mr. Hale judges; or who can say that they did not honestly exercise the discretion, however little it might be, given to them by the Acts of the Assembly?

When you come to the lower part of the line that is in controversy, from County Corners and Laurel Top on, you find that there is apparently a continuous ridge still in a southwestward direction called the State Ridge, which is the ridge along the line run according to the contention of the complainant, and which we think quite evidently was so named because the line ran along it. This ridge for the first two miles is higher than any other ridge, and in going from it, the ridge around the waters of Tellico by McDaniel Bald where the State of Tennessee claims the line to be, you go down a distance of nearly four hundred feet and almost at right angles. In continuing down the State Ridge, you pass the holly tree plainly marked "86 M" and reach Jenks Knob at a distance of about five miles, whereas, in going around the other ridge as claimed by the defendant, the distance is about six miles further and misses the 86th mile tree; in other words, comes out at a point about a mile and a half further south than the 86th mile tree. So that, that tree could not be on or anywhere near the line as claimed by the defendant, and the Tennessee contention is in the shape of a pocket or loop, and the 101st mile tree would have to be about 106 miles. From that point to the extreme southern end of the line is undisputed.

It would further appear that if you attempted from the extreme northern limits of the survey, as made by the commissioners in 1821, to follow the divide of the waters, you would not get anywhere near the Tennessee line as claimed by either party. This only appears in the testimony of S. S. Gannet, but we believe is nowhere contradicted. So, that to follow the water-shed would lead the surveyor astray.

THE COMMISSIONERS' MAP OF 1821.

s map, at the time of the original hearings in the case
Hard v. The Beddings, had not been discovered. It
ards became the ground work of an application to file
of review in that case and has played an important
n this case. It has been the subject of a great deal
icism.

nnecting with W. D. Hale, whose testimony on the
review in the last mentioned case has been incorporated
is record by stipulation, it is desirable to call the at-
of the Court again to the fact that Hale might be
the dominant factor among the surveyors who worked
l testified for the State of Tennessee, and to reiterate
making his survey in 1896 and 1897, after discov-
he undisputed line northeast of the river, he looked
e country southwest of the river, and what induced
make up his mind as to where the State Line ran, he
ked the question (Record 1326), from what he formed
lgment, and in answer said that his running the lines
affect it; that he formed his judgment from the com-
ners' report and the topography. And further, having
sked if without the Commissioners' report, the topog-
would have been of any service to him in forming
nion, he answered that it decidedly would, and when
for his reasons, stated that it was because it was the
atural boundary and the most prominent ridge.

ther words, taking the language of the laws and the
issioners' report, and putting his own construction upon
nd forming his own opinion as to which was the main
he concluded that the Hangover Ridge in that part
undisputed line just southwest of the Tennessee River
ere the Commissioners ran the line, and his survey
marks had little if anything to do with it.

ill be found on examining his testimony that this judg-
formed in the manner indicated, shaped every subse-
uction as shown in his testimony, and we think we do
him injustice when we say that all of his subsequent

examinations of the line and what he says about it, are made to conform to that preconceived opinion from which he was unable to get away; and while with reference to the formation of an opinion correctly by Mr. Burns with that map before him, he made up his mind that the line could not strike the Little Fodder Stack Range, Williams was asked whether in twenty-four hours a surveyor could make up his mind where that line ran southwest of the river, yet it seems to be apparent that after Mr. Hale got to the point on the undisputed line northeast of the river, from which he could look over the topography to the southwest of the river, it did not take him even that long, nor anywhere near it, to form his judgment as to where the line ran, and it is apparent also that Hale's controlling idea was not to find where the line was actually run, but to ascertain where it ought to have been run.

Mr. Hale in his surveys used a compass, and with reference to that method of surveying, especially in a rough, mountainous country, and as distinguished from the accurate results obtained by the use of the transit, we quote from Professor Gillespie's work on surveying, as revised and enlarged by Professor Staley, President of the Case School of Applied Science, published by D. Appleton & Co., of New York, in 1908, Volume 1, page 197. In discussing the transit, the author says in reference to the compass:

> "It is little used in connection with the transit, which is so incomparably more accurate, except as a 'check' or rough test of the accuracy of the angles taken, which should about equal the difference of the magnetic bearings."

And on page 111 of the same volume, under a paragraph headed, "Defects of the Compass," the author says:

> "The compass is deficient in both precision and correctness. The former defect arises from the indefiniteness of its mode of indicating the part of the circle to which it points. The point of the needle has considerable thickness; it cannot quite touch the divided circle; and these divisions are made only to

whole or half degrees, though a fraction of a division may be estimated or guessed at. The Vernier does not much better than this, as we shall see when explaining its use. Now, an inaccuracy of one-quarter of a degree in an angle, that is in the difference of the directions of the two lines, causes them to separate from each other 5 1-4 inches at the end of 100 feet; at the end of 1,000 feet nearly 4 1-2 feet, and at the end of a mile nearly 23 feet. A difference of only one-tenth of a degree, or six minutes, would produce a difference of $1^{3}/_{4}$ feet at the end of 1,000 feet; $9^{1}/_{4}$ feet at the distance of a mile. Such are the differences which may result from the want of precision in the indications of the compass.

"But a more serious defect is the want of correctness in the compass. Its not pointing exactly to the true North does not indeed, affect the correctness of the angles measured by it. But it does not point in the same or in a parallel direction during even the same day, but changes its direction between sunrise and noon nearly a quarter of a degree, which will be fully explained hereafter. The effect of such a difference we have just seen. This direction may also be gradually altered in a moment without the knowledge of the surveyor, by a piece of iron being brought near to the compass, or by some other local attraction, as will be noticed in Article 186."

The complainant's witness, D. B. Burns, used the transit and states that a survey by such an instrument is almost absolutely accurate. When Burns and Gannet were surveying together, Gannet testifies that he used the same instrument that he used in locating the line between the states of Idaho and Washington, and used the methods that are the standard methods of the United States Government. With this information, it can be readily seen that not only an original compass survey, but that the testing of all other surveys and plats are subject to all of the inaccuracies of the compass itself.

With this map before him, his criticisms of that map and the line indicated by it, arise from the following considerations, which to his mind seem to carry conviction.

He says (Record 1126), that it is not possible to get accurate angles from the map of 1821, and that the courses and distances could only be approximated. It may be well to remark here that the scale of that map was 800 poles to the inch, and it means that 1-100 of an inch represents 132 feet.

On the same page of the record, in describing his attempt to ascertain the line by that map, he states that he crossed and re-crossed into the States of Tennessee and North Carolina and was at times entirely down off of the mountain.

As in testing the Davenport notes, as we shall hereafter show, so in testing this map he must have paid no attention to the fact that that kind of surveying, as all of our witnesses testified, is done by sighting straight lines from one natural object to another, but measuring around the meanders, and on page 1127, he states that it is not possible to locate the line up Slick Rock Creek with that map, and that the stream marked "creek" cannot possibly be Slick Rock Creek; and in his opinion that map is only a sketch map, and that they sketched the Cheoah River and called it a creek.

Whatever may be the deficiencies of this map, there is one thing that it shows cannot be the case, and that is the claim agreed that the line crossed directly from Tree 29 a short distance northeast of the river to the bluff on the southwest side of the river, and thence along the Hangover Ridge. It does fix irrevocably the fact that they crossed at some stream, and the question on page 1127 is predicated upon that showing.

Now, as shown by the map, from about the locality of the 64th mile tree there is a straight line drawn, a mile in length, as measured on the map, south 75 degrees west to the mouth of Slick Rock Creek, or a stream. In descending the line on the northeast you come down at an angle of about south 15 degrees west. Slick Rock Creek is about half mile to the right, and that line is drawn to the right, while Cheoah River is a much larger stream about a mile and a quarter to the left, and even if that straight line to the mouth of Slick Rock Creek by mistake was made south 75 degrees west, and the

commissioners meant south 75 degrees east, in one mile it would still strike a considerable distance away from the mouth of Cheoah Creek and would not even reach the Tennessee River, but would be a short distance northeast of it on dry land. Furthermore, Slick Rock Creek strikes the Tennessee River at about a right angle, whereas as shown by Exhibit "D" to the deposition of Burns, facing page 256 of the record, Cheoah River might be considered simply by looking at it, as the continuation of the Tennessee River instead of a branch, and it runs almost at right angles to the line as contended for by either State; and if the line was carried up that river, it would be getting further and further away from either contention. In addition, if the Cheoah River were intended to be the stream, no one of the subsequent courses and distances would fit it in any way, shape or form, and Williams, one of defendant's witnesses, says that in going over Hangover Ridge you could not see Cheoah, but that if you could see it, no one could fail to perceive that a line running up that river would be running almost straight into the State of North Carolina.

On the same page (1127) he speaks of that line as crossing the Tennessee at right angles and that therefore it must have crossed directly from Tree 29. This same criticism in different words is advanced by other witnesses for the defendant. For instance, it is said that that line appears to carry the State Line across the Tennessee River upon the same line that it strikes the river, and therefore it must have crossed at Tree 29. A more fallacious train of reasoning could hardly be devised.

The Tennessee River right there takes a bend to the north, or possibly northeast, for a short distance, and a line therefore might come in an absolutely contrary direction from Tree 29, cross the river, and yet cross it at right angles. It is quite supposable that a line would cross the river upon the same line at which it approached it, and yet to know where that line is located is entirely dependent upon the point where the line reaches the river; and a line might cross the Tennessee River a hundred miles away at right angles, and

yet in no way be shaped like a line running directly across from Tree 29.

On 1128 he explains why he thinks that the stream marked "creek" is Cheoah River, but further along in his testimony says that it would have been absurd to suppose that the commissioners went to Cheoah River, and although he couples it with the equal absurdity in his mind, of thinking that it went to Slick Rock Creek. But, on the last page mentioned, he describes the ridge on the north running off towards Cheoah, and also the one on the southwest leading to the mouth of Cheoah, which latter ridge he says is the main ridge on that side of the river, and states that those two spurs would to strangers seem to be the line to take and thus get to the Hangover Ridge over what he calls the main spur to the mouth of Cheoah.

On 1129 he describes the spur or ridge running to the Hangover from the mouth of the Slick Rock Creek and states that the shading on the map south of the river would indicate that the slope of the ridge was on the side where the shading is, and that they were on the top of a ridge and south of the river on the map of 1821, and that it indicates that after a distance from the river they were on the top of a ridge. This distance is elsewhere stated to be about two miles from the river.

On page 1130, in criticising this map, he proceeds to give the angles, five in number, although he has previously stated that the courses and distances could not be ascertained from that map. On the same page he says there is no ridge in the neighborhood of the mouth of Slick Rock Creek that could possibly conform to this map, and that the angles and distances of the 1821 map would not follow the ridge or crest. It seems to us that this is an admission of the case that that map, which is solemnly filed by the Commissioners as showing the line by its courses and distances, does not indicate that just south of the river the line runs on the Hangover Ridge, or any other ridge, for a distance of five miles; that it is just our contention.

Furthermore, on page 1131, that the map does not show that the line followed Slick Rock Creek for a distance of five

miles. The point about that is, and the testimony shows as a customary method, that the topography is merely sketched in and that Slick Rock Creek is inaccurately sketched on the map.

There is not a map in evidence in the case on either side that is not admitted to be a mere sketch map, so far as the general topography is concerned, and that it may be reasonably accurate, or very inaccurate, is shown by many maps.

The witness continues that about a mile and a half from the river the map shows that the commissioners were on the crest of some ridge, and that no surveyor could take that map and locate any ridge they were following; that it is so inaccurate, the scale is so small that there are no names indicated for mountains or streams, and that the witnesses would not know how to follow that map, even where the line is undisputed. That it is misleading. He says the general southwest course of the map is approximately correct and as a sketch map to show that they followed the crest of a ridge and crossed streams it is correct, but, as to showing what ridge they followed, and where they crossed streams, the map is not worth the paper it is written on. And furthermore, that it does not show accurately the ridges around Tellico.

Upon cross-examination, Record 1133, he states that in connection with Mr. Muller he took the bearings off of this map, taking each course separately, from the 59th mile tree. This is a strange admission after stating that it is impossible to get the courses and distances from that map, and on page 1135 he gives the courses and distances for seven miles south of the river to where the line of that map takes a bend to the left, as running south 14 1-4 degrees west, and for the next three miles as south 20 degrees east, which are a very close approximation to the true distances and courses according to the true meridian.

He states that from the river to Hangover on his map is south 8 degrees west, and from Hangover to the junction south 60 degrees west.

On re-examination he continues to reiterate these general objections, and concludes that there is no possible way to locate the line except over Hangover. On 1140 he states

that the shape of the stream marked "creek" would nearer fit Cheoah, and in answer to the question "Taking the calls as reported by the Commissioners and this map, and speaking from your knowledge and experience as a surveyor, where did these Commissioners locate that State Line?" he says first, "On Slick Rock Lead" and changes it to "No, on the Hangover Lead."

On 1141 he still stresses the shape of the stream and states that the map is utterly worthless, and that you cannot take the map and scale the courses and follow the actual marked line, and that the inevitable result is that they must have gone over Hangover.

If he could not follow the marked line, he must have meant that the marked line was up Slick Rock Creek. On 1142 he says no stream comes in opposite Tree 29, and that Slick Rock Creek is on the right and Cheoah on the left, and that Slick Rock Creek runs northeast for several miles and Cheoah northwest.

In connection with the location of some point on the south side of the river, which seems to have been unlocated on that map, the witness John L. Williams for the defendant, is asked whether or not there would have been any difficulty in designating such point, inasmuch as even according to the scale of that map it would only require a line of about a quarter of an inch, then to say there is difficulty in locating a point at the mouth of Slick Rock Creek by a line from the 64th mile tree, which according to the scale of the map would be 4/10 of an inch, and to say that it is impossible to get the courses and distances from that map is to our minds incorrect, because with a meridian, a ruler and a protractor, any course or distance on that map could be ascertained even by an amateur, if it were visible to the naked eye, and it will be seen when we come to the testimony of the complainant's witnesses, that there is no difficulty whatever in locating the line by that map.

In the territory below around Tellico, this witness on page 1181, states that he does not know how he would run from the calls of the Commissioners' report, leaving out the words, "extreme height" and confining it to the distances, from

Laurel Top he would go by the State Ridge. On page 1187 he states that on the whole, you do not travel southwest to get to points along the line surveyed by the witness, and on page 1242 he says eliminating the etching and taking the line alone, it would not go around Tellico River, and that on his map Slick Rock Creek and Little and Big Fodder Stack were only sketched in, and on page 1227, he states that the map of 1821 is a sketch map.

On page 1634, he says that the map of 1821 could not have been made from the Davenport notes. That the commissioners might have run up Slick Rock Creek, but only tentatively. That the time of their survey was too short; and on page 1635, he says, "I believe the commissioners ran the State Line down the State Ridge, crossed the Tellico, but abandoned that line."

John L. Williams, a surveyor of Polk County, Tennessee, whose testimony begins at Record 1403, of whom I can say that I think he tried to be fair as much as his surroundings would permit it, and I feel quite sure that he was the most competent surveyor on that side of the case.

It is true that he viewed the ridges southwest of the river much as Hale did, but he says the abrupt turn six or seven miles south of the river seemed to show that they did not go over Hangover Ridge, and that he had considered that a good deal.

He states on page 1414 that to take the shape and the alignment of the line alone, the map of 1821 does not conform to either line, but more nearly to the Slick Rock Line; but that taking everything else, it more nearly conforms to the Hangover. That the etching indicates that there was a ridge to the right of where they went up, which he concludes to be Hangover or the ridge to Hangover from Slick Rock Creek, but there was also a ridge, to-wit, Little Fodder Stack, on their right as they in fact did go up.

He proceeds to compare the shape of the stream marked "creek," and states that at the end of two miles the 1821 map shows that they were on a ridge and not running five miles up the creek. On 1417 he says as a surveyor, if he were running up a creek, he would only show the creek.

That from the Hayo Peak to the Cheoah River the nearest point is 1 1-2 miles.

On page 1423 he says: "I never came to any positive conclusion as to the line at Slick Rock Creek, but could never see that they could have done anything else than go over Hangover," and reiterates that the plat shows that they crossed the river on the same line as they ran to the river, and hence that they must have gone directly across.

At the Tellico, after taking the distance from Laurel Top to Jenks Knob alone, that it indicates that the commissioners did not go around the Tellico River. On 1448, that if the line is marked on the State Ridge, and the distance to the 101st mile post was 101 miles that way, he would say that those things would indicate that the commissioners surveyed by way of the State Ridge. On page 1457, he says that running in a southwest direction, if you struck any stream at all, it would be Slick Rock Creek, and that you could not reach Cheoah on that line, and that if you reached the mouth of Slick Rock and went seven miles south 11¼ west, that you would strike the top of Big Fodder Stack, and thence three miles south 20 degrees east, that you would land at the junction and that maps of this kind (page 1458) are not intended to be accurately topographical maps, and that Slick Rock Creek is incorrectly located. On 1460 he says that no other stream than Slick Rock Creek comes in there. That the bluff across from Tree 29 is nine hundred feet high. On 1461 that Cheoah River is about at right angles to Slick Rock Creek, and at an angle of 60 to 63 degrees to Hangover, and that a line going up Cheoah would be getting further away from Hangover and Slick Rock all the time, and that its mouth is the nearest point. That the bluff on either side of the river extends from Slick Rock Creek to the mouth of Cheoah. On 1465 he says, "The fact that I had made up my mind from observation that Hangover was the main ridge, was one of the controlling factors in my mind."

On 1466 he says that the courses and distances, that is such minute distances as 132 feet to 1-100 of an inch, could not be shown on the 1821 map; and on 1467 he says, if a mistake was made in an angle and he got off the line, but

there was some object that he knew was on the line, he would correct it. That would be customary. That if Hangover is the line, the following of a stream for any distance would be utterly irreconcilable with it, and that he knows of no stream running for an equal distance so near the State Line, whether it is on Hangover or Slick Rock Creek, as that creek does.

On 1468 he says the straight south line to the Georgia line is undisputed, but it does not follow any ridge and crosses one or two small streams not mentioned in the report nor on the map. On page 1469 he says, if the map of 1821, with the indications on it he has mentioned, and if he had found a marked line up Slick Rock and the spur to the Big Fodder Stack, those facts would be very controlling and would indicate that the commissioners went up Slick Rock Creek. As previously mentioned, that he personally made no survey at all of the river at that point, and on 1477 he says: "If I was absolutely sure of the State Line marks on the Slick Rock Creek Line, they would control me." On 1479 he says if he had been among the surveyors originally, he would have gone to the mouth of Chesah. On 1483 that he has never been able to reconcile the map of 1821 with either Slick Rock Creek or Chesah. On 1566 and 1567, in reference to an error in the Davenport notes between the 71st and 72nd mile, he states that the map itself corrects that error.

On 1590 he says, "I knew the North Carolina contention went up Slick Rock Creek (1589 and 1590) but I did not survey it," and that in a long survey like that you cannot expect courses and distances to come out right. That the way they tested the map and the notes was not a natural way to test a survey, and they could not expect it to come out right, and that if he were to go out there today and be shown the line and the marked trees, if they could be found, that he could say that nobody could go along the line plotted in red and green and file it as a test of the notes and map.

On page 1621 he says that it is apparent that the man who made the map of 1821 and the man who made the Davenport notes had information of the same survey and the general outlines are alike. That the courses and distances are

practically one set; in the main they are the same and he thinks that by careful work, field notes could be made from the map itself, which would make another map which would very closely resemble it.

The above are the only witnesses for the defendant whose testimony it seems necessary to consider with reference to the map of 1821. What the witness Muller says about it is only echoing the opinion of W. D. Hale, and is not nearly so complete and relates mainly to the shape of the creek and the ridges.

It must be quite evident from even a slight consideration of the testimony as quoted of Hale and Williams, that the question is not so much whether you can obtain from the map of 1821 the courses and distances and shape and apparent locality of the line, but whether you can fit the line as laid down on that map and the field notes of Davenport and the marks to some ridge which those witnesses have made up their minds is the ridge over which the Commissioners should have gone, and therefore did go, and the chain of reasoning would seem to be that a map which does not show that the line went over the Hangover Ridge, and field notes and marks which show that the line went somewhere else, must necessarily be worthless, because they have begged the question and already determined that the line went over Hangover.

The largest and most important part of the testimony with reference to the map of 1821, comes from what complainant's witnesses Burns and Gannet say about it. The testimony of D. B. Burns begins at page 226 of the record, and on page 233 he says that in making his survey he had the plat of 1821 with him. On page 242, that in the neighborhood of the Tellico country below, the State Ridge tallies with the map of 1821. On page 246, that Mr. Gannet commenced at the 59th mile tree, which is exactly 6.02 miles to the Tennessee River at the mouth of Slick Rock Creek, which he found from the use of the map of 1821 and the measurements, and that from there to the Tennessee River, as contended for by the State of Tennessee, it is only 5.47 miles, to the south side of the river, and that according to the map

of 1821, from the river to the junction is ten miles, and from the 59th mile tree to that junction 16 miles; whereas by the Tennessee contention it is only 11 miles. On page 247, he says that according to his bearing on Exhibit "D," from the 59th mile to the 65th it is south 55 degrees, 5 minutes west, but on the map of 1821 it is south 58 degrees west, and south of the river to the first short turn to the left on the map of 1821, from the 59th mile tree to Big Fodder Stack on Burns' plat is south 49 degrees, 40 minutes west, while the 1821 map shows 50 degrees 40 minutes west, and Hangover is south 29 degrees 8 minutes west. That from the south bank of the Tennessee River to Fodder Stack, according to his measurements is south 14 degrees 28 minutes west, while the map shows south 13 degrees 25 minutes west, and from the south bank of the Tennessee River to Hangover is south 9 degrees 29 minutes west. And the witness states that he could locate Big Fodder Stack on the 1821 map.

On page 248 he says Hangover does not tally with the 1821 map, it breaks to the right instead of to the left. That the Tennessee River to Big Fodder Stack is shown to be 6.67 miles, while on the Tennessee contention Hangover is 5.9 miles from the river, and by the North Carolina contention the line from Big Fodder Stack to the Junction is 3.37 miles, and by Hangover 2.59 miles; and that the 1821 map shows 3 1-3 miles. From Big Fodder Stack to Junction is south 18 degrees 12 minutes east; from the 1821 map is south 19 degrees 15 minutes east, while from Hangover to the junction is south 60 degrees west.

On record 249 he says that the North Carolina contention agrees with the 1821 map, and that the witness' map is exact with the 1821 map, and Exhibit "B" facing page 250 of the record, is a comparison of the three lines.

On page 251 he says at undisputed points the Tennessee contention agrees with the map of 1821, and at other points the trend of the line is different. That map turns to the left at about seven miles from the river, while the Tennessee contention turns to the right, and Exhibit "C" facing page 252 is a comparison of those contentions.

On page 253 he says that his plat shows 27.61 miles to the

86th mile tree, whereas, the Tennessee contention, carrying it by way of State Ridge, would be 25.56 miles from the 59th mile tree, and that by the Tennessee contention you cannot reach the 86th mile tree. And further along it is stated that it comes out a mile and a half further down than the 86th mile tree. That by his plat, from the 59th mile to Jenks Knob is 28.77 miles; by the Tennessee contention 32.82 miles, and by the map of 1821, 28.01 miles, and that the Chesah River, for a distance of ten or twelve miles is almost at right angles to the undisputed line. That the plat shows that they followed the creek, and that opposite Tree 29 there is a bluff 700 feet high, extending half a mile up and down the river, and that there is no ridge there.

On page 259 he says that the commissioners' report agrees with the plat. On page 261 that the stream marked "creek," is sketched in wrongly, but that by the Hangover route the first stream would be the Hiawassee River, 37 or 38 miles from the Tennessee, and at the 38th mile, two circles that seem very close together are in reality intended for the same circle.

On 263 he states that the trail mentioned at the 93rd mile comes out just right by the map and that the 101st mile tree, which is an undisputed point, was also tested by comparing its bearing on his map with the bearing of the 1821 map, and they agreed, and thereupon he states what in his estimation and opinion is the true location of the line, and why Big Fodder Stack Range would be selected.

On page 270 he says that he made his survey by a transit, which is much more accurate, and on 271 that the map of 1821 must have been made by a compass, and explains on page 273 the significance of the straight line on the 1821 map from the 64th mile tree.

On 282 he explains the trail at the 96th mile, which is a continuation of the trail that strikes it in the neighborhood of the 93rd mile. That the straight line from the 64th mile tree on the map crosses the Tennessee River at an angle of 60 to 80 degrees.

On 285 he explains that surveyors in rough surveying would sight from one point to another, but in measuring

would follow the meanders. That the straight line to Slick Rock is over very rough country. He thinks that the line that the Commissioners adopted was the line they marked. He then says that it is impossible to cross at the 29th mile tree, and that the straight line from the 64th mile tree carries you very close to the mouth of Slick Rock, and is south 75 degrees 30 minutes west; while to the river, as Tennessee contends, is south 53 degrees 55 minutes west.

On page 288 he says that the error in sketching the creek would make the hachures come too early. On page 290 he says, taking the map of 1821 and starting at an undisputed point, it would not be possible to go around Tellico, nor by way of Hangover, and on that page and on 291, that only Slick Rock Creeks fits the map and report. That the report of the Commissioners mentions the west fork of Tellico, but the map does not show it. On 297 he says he first supposed the line went up Slick Rock Creek a mile and a half, and then went up Little Fodder Stack.

On page 318 he says: "I tested my survey where I crossed the Tennessee River to the top of Big Fodder Stack, and compared it with the bearings of the map of 1821," and that he was out to determine from that map whether the line went up the Little Fodder Stack or Slick Rock Creek, or over Hangover. He agrees that the straight line at the extreme southwest end of the survey, reaching the State of Georgia, is not due south, and on page 320 explains again the method of surveying by sighting various points and measuring around the meanders, and on 322 the variations of the needle.

On 327 he says that streams are only sketched on the map of 1821, and that the Tennessee River, which is only 400 feet wide, yet is shown on the map to be 3,200 feet wide, and on 332 that Slick Rock Creek is about 10 feet wide, and is shown to be 800 feet wide.

On 354 that it is a matter of opinion whether the straight line from the 64th mile tree to Slick Rock is the State Line, or whether the Commissioners adopted the line around by way of Tree 29, where they marked it.

On 358, speaking of where he commenced his survey, he says he was carried from there to the Tennessee River, and

thence to Slick Rock Creek by the map of 1821, and by the marks. That the rule in following old maps is to always go to the monuments. That it would be absurd to expect to find everything on the ground just as on the map, and that certified copies of the map of 1821 seem to differ. That the copy used by the witness Williams was not like the one he had, in regard to the ridges or the creek. That also there was a difference in the locality of the path from the valley towns; that all of the streams on that plat were exaggerated. On 361 he says that Slick Rock Creek is only sketched in and wrongly sketched; that it is exaggerated in width and length.

On 361 he describes Slick Rock Creek and states on 362 that it was the only stream on the right that you could see, and that it corresponds with Cheoah at no point. That the Cheoah for seven or eight miles is north 45 west; Slick Rock Creek for the first mile and a quarter is north 35 east. Of course that is going in a northeastwardly direction.

On 363 he says that the south line at the extreme end of the survey, although it is out seven degrees from the true meridian, is not deceiving, and in fact the line there is undisputed, and he thinks one reason why it seems so (page 364), is that the map is pasted together crooked. On the same page he says further in following the waters of Slick Rock Creek you get a curve to the junction, concave from the east, as the map shows, while in going up Hangover to the Junction you get a curve in the opposite direction, concave to the west. "My curve is on the 1821 map, and the map was a great advantage."

That there was a great variation in the general bearing from the Tennessee River to the Big Fodder Stack and from the Tennessee River to the Junction by way of Hangover, of 30 or 40 degrees, and from Big Fodder Stack to the Junction, and from the Hangover to the Junction of 40 or 50 degrees.

On page 378 he said it would be impossible to indicate every bend on the 1821 map, and that the fair way to use such a map is to follow a general course. On 379 that the Cheoah is a large stream with creeks running into it, and that in going around the headwaters of Tellico it would be

about six miles further than by the State Ridge, to reach the 1614 mile tree.

The next witness is S. S. Gannet, whose testimony begins on page 108 of the record. In making his surveys, which was partly on his own account and without the assistance or presence of Mr. Burns, he states on page 113 that he had this 1821 map with him, and on page 114 that his survey tallied almost exactly with the 1821 map. That it would not tally with that map to go around the headwaters of Tellico by McDaniel Bald; that around there is twice as far as by the State Ridge. That the line as marked agrees with the 1821 map, and that obviously the other route was so far out of the way, according to the map and marks, that he did not deem it necessary to go around that way.

On page 117, speaking of going northeast, he says the 1821 map going northeast carries you from the Big Fodder Stack route to the forks of Slick Rock, and thence to the mouth of Slick Rock, and that the marks carry you over the same line.

On page 118 he says that he found Burns' work the most accurate that he had ever known in such a rough country. That the Slick Rock Creek would be the most natural way to reach Fodder Stack and the Junction, and that that would agree with the 1821 map. That the other line was entirely too far to the east or left. That across from Tree 29 is a very steep bank 800 feet high up and down the river, and that that would not be a practicable route, for it was too steep, and it was practically impossible to survey a line up and down that bluff.

On page 125 he says the Government contour map exhibit (page 106 of the record), shows the Slick Rock Creek as the line, and that the Big Fodder Stack is in a general southwest course, and then turns a little east of south to the Junction, the same as the North Carolina contention. On page 128, that by his survey, it is 6.02 miles to the river by the Burns and Gannet map, at the mouth of Slick Rock Creek; six miles, by the 1821 map to the mouth of Slick Rock Creek, but by the Tennessee contention only five and

one-half miles to the river, and he confirms what has been said about the distances to Big Fodder Stack and thence to the Junction, as stated by Burns.

On 429 he says the stream marked creek on the 1821 map can only be Slick Rock. That Cheoah is a mile and a half to the east, and could not possibly be the creek. That Slick Rock is at almost right angles to the Tennessee River; Cheoah is at an acute angle and comes from the southeast, and Slick Rock from the southwest. On page 430 that the 1821 map is a map of a line, not of the general topography. And on that page, and two subsequent pages, he states in what respect Hale's map is very inaccurate.

On page 433 he says that there is no doubt in his mind that the commissioners went up Slick Rock Creek and below along the State Ridge, crossed the Tellico and up Jenks Ridge, and that in addition to the marked trees which would show that line, that the map of 1821 shows it, and it agrees in his opinion with the route that would be naturally selected. That it is not possible to fit the commissioners' map to the Tennessee contention, and that the map so indicates at both disputed places. On 434 that he could locate objects by that plat, and its courses and distances and could locate the line with it.

On 441 he says surveyors would take a general bearing, but measure around the meanders. On 442 that going around Tellico you depart from the plat and that he tested Burns' notes from the Junction to the mouth of Slick Rock Creek. Among other ways, by the geodetic co-ordinates, and computations based thereon, which to him proved that the survey around Slick Rock was absolutely correct. On 443 that the proper interpretation of the Commissioners' map is that the line follows the creek; that the hachures are sketched in, and that it would not be possible in running a line from Virginia to Georgia to follow the water divide and make it come anywhere near Tennessee. And again he says the map of 1821 by courses, cannot go around Tellico. On 467 he reiterates that the line around Tellico could not possibly agree with the 1821 map.

On 474 he explains the divergence of the line from the

creek as shown by the 1821 map. On 478 that no map made is absolutely correct. That in following the meanders the map generalizes. That the streams are not drawn carefully. On page 483 that Brazier's map of 1833 shows the line up Slick Rock, and on 484 that the Cheoah is several miles east of the line; that the line down the State Ridge agreed very closely with the commissioners' map. On 491 he says that map only shows in a general way the summit of the mountain and some of the streams and rivers, and that it is customary to sight from one common object to another in such a survey.

On 497 he says that there is no main ridge until you reach the Junction; that the ridges spread out like fingers. On 498 that the photographic copy of the original 1821 map shows a line in the center of some shading that is the State Line, and that that line strikes exactly in the mouth of Slick Rock Creek, and that in this respect it differs from the certified copies. That the straight line on the map from the 64th mile tree lands you at the mouth of Slick Rock Creek. On 499 that looking at Cheoah you are looking southeast to the left, whereas, Slick Rock is to the right, and to reach Cheoah you would go 50 degrees east more than a mile. That if that bearing from the 64th mile tree to the Slick Rock Creek mouth is a mistake for south 75 degrees east, you would still not reach Cheoah, but it would land you on the north side of the Tennessee River about a quarter of a mile back, and that according to the courses and distances of the commissioners' map, you could not go up Cheoah, but would be getting further away all the time. On page 504 that the 86th mile tree is several hundred feet south of the Tellico River and by the Tennessee contention you would not reach it by a mile and a half; the nearest point is Jenks Knob.

On 510, that from the plat of 1821 and other information, he could see that the line could not diverge as claimed by the defendant. On page 517 and following, that the calls of the Davenport notes correspond very closely with the Commissioners' map.

Whatever other witnesses for the complainant speak of this, it might be said that these two witnesses are fuller and

more accurate, and as in the case of Hale and Williams, represent the best phase of the complainant's evidence as to the Commissioners' map, and it is not necessary to discuss the evidence of any other witnesses in connection with it under this particular subject matter.

From the 59th mile tree, on the northeast, to a point where Burns commenced about 3 1-2 miles northeast of the river, Mr. Gannet made his own survey, and from Jenks Knob coming to the north to Laurel Top, he also made his own survey. In other parts of the route he went over it carefully and tested the survey of Mr. Burns.

If there is any disinterested witness in the case, Gannet is one. He was deputed by the United States Government, at the request of the Attorney General of the State of North Carolina, to find, if he could, this line. His experience, practical and theoretical knowledge cannot be disputed. He had no purpose to serve, except to find the correct line by the exercise of the highest skill that could be brought to bear upon the subject, with what result, of course, it remains for the Court to say; but we do not hesitate to say that our conviction is that his effort was crowned with absolute success. There is no effort on the part of either Burns or Gannet to carry out any preconceived notion from the looks of the country.

Mr. Burns went at first with the idea that the line went up Little Fodder Stack Range, and Mr. Gannet went, so far as we know, without any preconceived idea. So that we think it may be said that their efforts were directed to the ascertainment of the line as really located by the Commissioners, and therefore it did not occur to them, nor seem to them proper, to discard all of the evidence as to where the Commissioners in fact located that line, because they had an opinion that the line must be fitted to some ridge, and all information as to the fact of location be discarded.

Whatever may be the deficiencies of the map of 1821, there are some things that are settled conclusively by it. Everybody concedes that it shows that the State Line crosses the Tennessee River on a straight line from about the 64th mile tree to the mouth of a creek or stream, and that therefore it

is impossible to claim that the line crosses the Tennessee River directly from Tree 29 to the Hangover Ridge, and thence along that ridge. It also shows that the stream that it strikes is to the right, at an angle of south 75 degrees west, at a mile from the 64th mile tree, and that would conclusively show that it could not strike a stream to the left more than twice the distance away, and when a straight line south 75 degrees east would not even land at the Tennessee River, but would land inland more than a quarter of a mile away from the Cheoah River. So that, even if the course south 75 west was an error, the matter would not be mended.

In the case of the error in the Davenport notes at the 72nd mile, the map itself corrects that error, so that so far as the line upon the map is concerned, we have a right to assume that the course of that is correct. And taking the shape of the line, as the defendant's witne Williams did, at the State Ridge, where he testifies that taking that shape alone the commissioners could not have gone around the headwaters of Tellico, so, in the Slick Rock Creek region, taking the shape of the line alone with its curve to the right, concave from the east, it is impossible to conclude that it could fit the Hangover Ridge, which curves in the contrary direction and is concave from the west, and still less could you fit it to the Cheoah River, which is to the left, but runs almost at right angles to the lines as contended for by either State, and when every foot as you ascend the Cheoah River would carry you further away from the line as claimed by either party, and at a distance of five miles instead of being in the neighborhood of the headwaters of Citico, which is entirely in the State of Tennessee, you would be ten miles away.

DAVENPORT NOTES.

These field notes bear every evidence of authenticity. A copy of the notes themselves is found commencing on page 624 of the record, and contains every course and distance from the start. These notes were found in a secret drawer of an old secretary that had been owned by William Davenport, and which had continued with him and his family since the time of the survey of 1821. It is in the handwriting of

William Davenport and his wife, who was in the habit of acting very frequently for him as an amanuensis.

These notes are fully authenticated and identified, either as the original or as a duplicate of the original, by W. D. Jones (Record 605), who was a grandson of William Davenport, and by Mrs. Emma Harper Cilley (Record, 634), his granddaughter.

These notes were taken and compared with the map of 1821, and the survey of Burns, and Mr. Burns personally went over the ground with these notes.

On page 380 he describes the relative situation of Slick Rock Creek and Citico Creek, and on page 391 shows that Citico heads up next to the ridge between Big Fodder Stock and the Junction, and on the opposite side of the mountain some prongs of it head up about at the Junction.

On page 643 of the record commences the testimony of Mr. Burns, especially upon these notes. The complainant's Exhibit "BB" (Record page 1560) shows a comparison of four lines: one run and marked by the commissioners of 1821 as shown by their plat; the second is a plat of the surveyed line made by Mr. Burns and Mr. Gannet, and the third is a plat of a surveyed line made from the Davenport field notes and commencing near the bottom of page 645 of the record and continuing to page 691, the matter is taken up in detail and identified with Burns' survey and the marks and courses and distances of the map of 1821, and it is shown that they all correspond with a good deal of accuracy.

Attention is called to a mistake in the field notes at the 72d mile, to wit, the course south 30 degrees west 80 poles, which should be east, but which Mr. Williams says the map itself corrects.

So far as Mr. Burns is concerned, he amply and in detail upholds these notes, and shows that at the crossing of the Tennessee River, the notes and the map of 1821 agree as to the straight line south 75 degrees west 320 poles; and Mr. Gannet, commencing at record, page 692, and continuing to 717, fully corroborates the testimony of Mr. Burns, and they both testify that the map of 1821 and the field notes substantially agree and they both substantially agree with the

survey of Gannet and Burns, and that they fit the North Carolina contention, and cannot in any way be made to fit the Tennessee contention or the Checah River theory.

On the other hand, Hale and Williams made a test of these notes and have a copy of Exhibit "BB" with that survey from the notes and the line on it in red and green. The method taken by these witnesses in trying to apply these notes is shown by the testimony of Hale, (Record 1622) and corroborated by the testimony of John L. Williams, commencing on page 1550, and the copy of Exhibit "BB" with that survey applied to it, faces page 1558 of the record.

Of course, these witnesses find a wide discrepancy, and even on the north side of the river, according to their evidence, they found themselves getting first over into the State of Tennessee and then over into the State of North Carolina, and on the south side of the river, when they got to the Junction, they found they were a mile and a half from that point over on the Citico.

In giving their testimony, especially Williams, they enumerate some thirty or forty discrepancies between the notes and the survey of Burns and in the map of 1821. We presume they used a compass and a protractor in making this comparison, and on cross-examination, however, Williams corrects a great many of his discrepancies, and in several instances acknowledges that he was entirely wrong.

Now the manner in which this comparison was made and these notes run out on the ground, was that they simply measured the lines as they conceived them to exist and discarded every natural object and every mark. On page 1,585 it is shown that they did not regard, or even hunt for any of the trees. That they found the Equonetlly path, but they discarded that and the gap as well. They discarded the creek, and on page 1,589, Williams states that they could not find a mile tree so marked from the 59th to the 64th mile, and therefore paid no attention to mile trees, although the position of those is undisputed. That he did not go to the creek with the survey, and in that respect departed from the calls; and that he knew that the North Carolina contention went up that creek, but that he did not survey to it.

On page 1,590 he admits that in a long survey like this, if you discard all natural objects, you cannot expect the courses and distances to come out right. And in answer to question 104, which is this:

Q. "And it therefore would not be a fair way of running a line where the natural objects were discarded of an old survey, would it?" To which he answers: A. "No, I could not expect it to correspond with the original survey." And he says that if he went out there today and was shown the trees, he would say that nobody could follow the lines plotted in red and green.

He then says on page 1,591 that these notes must have been the record of some survey; that they could not come from the imagination. On 1,592, that in following those calls of the notes he would consider it necessary to cross at the creek, and on 1593 that the notes indicated that the survey was going the general turn rather than getting every minute detail.

This witness further states that it was his observation on the ground that affected his belief and not the Davenport notes at all, though he adds that he cannot say that the Davenport notes cannot be made to fit the North Carolina contention, but he does say that they would not show the Tennessee contention, and that the North Carolina contention and the field notes both cross a creek at its mouth, while the Tennessee contention does not, and that the Davenport notes do show that the line circles around from the right to the left, while the Tennessee contention would circle around from left to right.

On 1,595 that the Davenport notes more nearly fit the North Carolina contention. On page 1,598 he says that if a survey had been made through there and sometimes would take a single course for a mile distant, and sometimes for half a mile, that the running and marking would have had to be around and not follow the course of the compass across.

On 1,600 he explains that the word "sketched" as used among surveyors, means that it is not the result of an accurate, actual survey, but simply an approximate idea of the maker's knowledge of the location generally. Commencing

on page 1,601, the witness is cross-examined on the subject of his alleged discrepancy and that continues for several pages, and this cross-examination serves to show that the witness in his previous examination had made several errors, and that in other respects his statement of discrepancies was subject to grave doubts. On page 1,621 he says that it is apparent that the man who made the 1821 map and the man who made the Davenport notes had information of the same survey; that the general outlines are alike and the courses and distances practically one set, and that in the main they are the same. That he thinks that by very careful work, field notes could be made from the map itself, which would make another map which would very closely resemble it.

Under the circumstances we do not feel that it would be useful to take up too much space or time to go into any very great detail of this testimony. The manner in which the test was made by Hale and Williams, under directions simply to take the lines as they conceived them to be (we mean the courses and distances from the field notes) and lay them on the ground, and that was done, and every test that an ordinary surveyor would make to correct or check the result of the courses and distances was to be ignored, and in ignoring those, you ignored every test of the accuracy, even of the witness, in drawing off these courses and distances, and in laying them on the ground with the compass and their own measurements with all of the inaccuracies to which the compass itself is subject. So that the result of that work, by their own admission is a conglomerate of the inaccuracies of the notes (if any there be), and also of the surveyors and the witnesses themselves and the instruments that they used, and this method condemns itself.

Commencing at the 64th mile, and where it says crossing the Tennessee River to a large white pine on the south side of the river to the mouth of a large creek and the 65th mile on a course south 75 west, and at a distance of 320 poles, and from there on where it mentions at the end of each mile the trees and the creek itself and lands at the end of the 72d mile on a ridge between the aforesaid creek and Citico Creek,

with the investigation that Messrs. Burns and Gannet have made of that locality, and the notes of the survey, certainly there can be no possible question that so far as these notes are concerned, Hangover Ridge and Cheoah River are absolutely out of the question, and the same result happens below for instance at the end of the 86th mile (record, 632) the bearing south 60 deg. west 32.0 poles to a holly tree, the 86th mile tree, which a line around the Tellico River could not reach by a mile and a half; the measurements and the shape of the line itself point to the line along the State Ridge inevitably, and all of these things make the contention of the State of Tennessee at both points absolutely untenable.

THE MARKED LINE.

In the testimony of W. D. Hale (record, 1311), introduced into this case from the case of Hebard against Belding, by stipulation, Mr. Hale says on page 1,313 that he surveyed the Hangover Ridge and gives a long list of trees, but there are only two of these trees that we desire to single out. One is a double sourwood in a gap, which he says was plainly marked, a fore and aft tree, with State line marks, about a mile from the river and three-quarters of a mile from the river he found a black oak, marked as a corner and some slight indications of marks as if it had been marked as a line tree on the State line. Of these two trees he produced blocks in the Hebard case, and they were the only blocks produced therein.

In looking for trees on the other line as contended for by North Carolina, he ignored all side line marked trees. In the case of *Hebard v. Belding*, as reported in the 103 Federal Reporter, the court assumes that there were two, or probably two, State line trees on the Hangover Ridge, but that the other line was the better marked line, and mentions that forty-one trees marked with State line marks were found on that line.

Hale says that the 86th mile tree (record, 1125), is undisputed. That the black oak that he mentions (record, 1,336), is on the ridge leading from Hangover to the Slick

Rock Creek, and that the sourwood tree was decayed inside so that its age could not be determined.

Williams (record, 1,433), says that he saw no trees on the Hangover Ridge that satisfied him that they were State line trees, and on 1,434, that it was not practicable to count the age of the marks on the sourwood.

All of the witnesses for the complainant, to wit, Burns, Gannet and Chambers, record, 555 to 559; Slagel, 760; Crisp, 562; Lovingood, 567 and 572; Bogle, 814 to 816; Hyde, 826 to 839, and Carver, 851 to 860, searched the Hangover Ridge and found no marks anything like the State line marks. William Jenkins (record, 167), who was acquainted with the Slick Rock Creek from the year 1859, says that he saw at that time the spruce pine at or near the mouth of Slick Rock Creek, about twenty yards from the mouth, which since has been destroyed by storm or fire.

Patten, at 369 of the record, in 1867 was investigating the question of taking over from his father in law two tracts of land on Slick Rock Creek, which had been entered in 1854, and in tracing the line found that same pine tree, marked with such marks as satisfied him that they were the old marks, and that this tree was ten or twelve steps below the mouth of Slick Rock Creek.

It seems that surveyors and woodmen acquainted with old marks have a way of distinguishing the similarity of marks and the instrument with which they are made, and the testimony shows that the State line marks were made with a small axe; and the testimony shows further that the so-called State line marks on Hangover Ridge were not made with the same kind of an instrument. And Hayes, at pages 796 and 802, and Bogle at 814 and Hyde at 826 and 827 and 838, and Carver at 851 of the record, testify that the sourwood tree was marked wiith miscellaneous marks that were not made in the same manner, nor with the same instrument that the State line marks along the undisputed portion of the line were made, but that they were made with the same kind of an instrument that Piercey, a former county surveyor of Cherokee County, used. This testimony comes from

a familiarity with the character of the marks made along undisputed portions of the line.

Burns and Gannet in their survey, Exhibit "D," have included a long list of State line trees, comprehending the trees along the whole survey from the 59th mile tree to the 101st mile tree, consisting of 124 different trees (see list on complainant's Exhibit "D" facing page 336 of the record), each one of which has been from time to time inspected and verified.

The witness for the complainant, H. P. Hyde (record, 8251), enters into a good deal of detail in regard to the marked trees, especially with regard to the sourwood tree and the black oak tree, claimed to be State line trees by Hale, and in this describes exactly what marks are on those trees and why they cannot be considered to be State line marks; and on page 829 says that he found all of the trees mentioned by Hale, but found no State line marks on them. That there was plenty of good timber there that would have taken marks but they were not there.

The witness Burns, on page 231 of the record, describes the State line marks, both fore and aft and side line, and on the next page tells of the significance of these marks.

There is also an important bit of testimony in this witness's testimony in relation to a tree that has been designated now as No. 30, said to have been found by Mr. Gannet. The witness Hale says that this tree bore undoubted State line marks, but that they were not old enough. This tree is about a quarter of a mile from tree 29, on the northeast bank of the Tennessee River toward the Slick Rock Creek. Hale blocked one side of the tree and brought the block in containing the blaze, but the part containing the hacks was left upon the ground in chips. On page 342 Burns goes into the details of this tree and states that they were not only State line marks, he having blocked the other side of the tree, but that they were eighty-nine years old, and the block that he took out was on the side up the river; it was a chestnut oak, 20 or 24 inches in diameter.

On page 366 he states that on his last trip he walked down the Tennessee River, passed tree 29 and continued on down

to tree No. 30. That at that time he did not follow the stream any further than tree 30, but on that trip he found about 150 feet further up the river from tree 30 a hemlock tree marked as a State line tree, very old marks, which he believed to be the original State line marks.

On page 367, on redirect examination, he states that there were two trees marked with State line marks between tree 29 and the mouth of Slick Rock Creek. That tree 30 is about 1,470 feet from tree 29. That he found the tree had been blazed on the east side, and he blocked it on the west side, and the block is in evidence in this case, labeled No. 11. He states that Mr. Gannet found this tree.

At various points in his testimony, particularly at pages 367, 368 and 369 of the record, he designates the trees that he found and states that Mr. Gannet had found some others which had been added to the list.

Mr. Gannet, on page 417, goes into considerable detail about his survey from the 101st mile northwestwardly, and states the number of trees that were found and were located between particular points. On page 417 he states that they found forty-seven trees, State line trees, between the junction and the Tennessee River on the Slick Rock Creek line, and he states that these trees that they found were marked exactly like the trees that they discovered on the undisputed portions of the line (record, 419). On page 427 he gives a list of the trees that he personally had observed, and states that he discovered tree No. 30, which has been already mentioned and testified about. On page 429 he testifies concerning tree No. 30, and states that it is a chestnut oak about thirty inches in diameter, and that it had two blacks and a blaze on the west side and the same on the east side; and both Burns and Gannet testified that those marks on the block that they brought in were of the right age to have been made by the Commissioners.

With regard to this tree 30, Hale, while admitting that the marks were State line marks if they were old enough, denies that the marks on the block taken out by Burns (record, 1,152), are of sufficient age, but he qualifies it in this way: He says, "I have examined this block and I find very

clearly defined in the wood 88 or 89 years old, four distinct hacks, but no blaze for that age. I do find a blaze in that wood about 57 or 58 years old, at the proper depth of that age, but none at the depth of 88 years." And afterwards on the same page he states that the blaze is 59 years old, but the hacks 88.

No witness in the case knows of any grant as old as 1821, and on 1,153 Hale states that it is sometimes very difficult to tell the age of marks. On page 1,149 is where the witness Hale states that he only cut out the blaze and destroyed the Hacks, leaving a part of the block on the ground. The hacks and blaze, which are clearly like State line marks, Hale testifies date back to about 1853.

John L. Williams, who has stated as heretofore mentioned, that he was never satisfied there were any State line trees on the Hangover Ridge, testifies at page 1,441 of the record, with reference to this tree 39. He corroborates the testimony of Hale as to blocking that tree, and states on 1,442 that those marks that they blocked were about 58 years old, but they only blocked out, or brought in, the blaze. That the hacks were cut out but left in pieces on the ground, and this blaze was divided into three parts, one of which Hale kept; the second piece was kept by Williams, the witness; and the third by Mr. McNab, and these were brought in to be fitted together and are blocks Exhibit 1 to Williams' deposition. But, when they tried to fit them, they would not exactly fit.

On page 1443 he corroborates Hale, that while the hacks on Burns' block of that tree are 88 or 89 years old, he claims there is no blaze there, and gives his reasons.

Inasmuch as these marks are in appearance unquestionably State line marks, yet they are denied to be State line marks because of the requisite age, and yet there is a mark on the Burns block 88 or 89 years of age, that apparently may be, or may not be a blaze. Burns and Gannet say it is; Hale and Williams say it is not. But, as far back as 1821 there is no evidence that anybody was marking trees in that locality except the Commissioners, and it would seem

that the marks must have been a state line mark and that the later marks must have been a remarking.

The witness Williams himself says that there were evidences northeast of the river of a remarking of the line at some points in about 1853. The State line was different from corner marks, and yet these are unquestionably in appearance State line marks. There is no evidence, nor would there be any reason to suppose that people right on or near the State line itself were imitating State line marks.

The witness McNab, who was a witness for the defendant, on pages 1.526 and 1.527 describes the block that Hale took out, also Burns' block, and at the bottom of page 1.527 to the top of 1.528, says that there are four hacks on it, nothing to indicate a blaze, only a dead spot at one of the hacks. He says if the hacks were not there, it might be taken for a blaze, but he thinks it was not intended for a blaze.

Messrs. Barns and Gannet were both experienced witnesses, which means a little more than that on looking at a tree they can tell what kind of tree it is, as, for instance in this case, it betokens an acquaintance with land marks and the method of making them: what they indicate, the instrument with which they were made, and their probable age.

According to the testimony of the witnesses for the defendant, it might be argued that they think that neither line was marked, for they certainly have shown no State line marks on Hangover Ridge, and attempt to discredit the marks on the other line contended for by the complainant.

The testimony with reference to tree No. 30 is of some considerable importance, not so much to the plaintiff as to the defendant, because the plaintiff's witnesses in their testimony inevitably point to the fact that the commissioners were going down the river towards Slick Rock Creek. If tree 30 was an isolated tree, and there was no corroborative evidence in the case; in other words, if it seemed strange and unnatural that that tree could be a State line tree, then there might be some reason to weigh carefully the contradictory testimony of the various witnesses. It seems to us that the character of that tree is to be determined on larger lines than

the mere weighing of contradictory statements as to the character and probable age of the marks.

When we consider that the marks themselves are evidently State line marks, or imitations of them, and that the marks whatever they are, on Barns' block No. 11 taken from that tree, in evidence, were certainly made about 1821, and that there were no entries, much less grants, in either State in that territory so early as that, and no probability that anybody would designedly imitate the State line marks, or would be making any marks whatever without any evident purpose; and further, when we consider that that tree is in the line that is indicated by the map of 1821 and the commissioner's report, fixing 65 miles as the point at which they passed the Tennessee River, and is entirely in accordance with the field notes of Davenport, and is in the line of the other marked trees, both north and south of the river, the conclusion becomes almost if not quite irresistible that that is a State line tree and is in the line followed by the commissioners.

W. P. Chambers, a surveyor of Bradley County, Tennessee, one of the complainant's witnesses, whose testimony begins at record 551, after describing what he did in the way of surveying the line, says on page 554 that he found tree 29, and on 555 that he found the chestnut oak tree 30, marked on the northeast side, and a little further along on that line towards the creek found a maple marked with three hacks on the north side, and just below Slick Rock Creek, found a black gum marked with three hacks. That all of these were old marks and had the same general appearance and seemed to have been marked with the same instrument, at the same time.

That the next day he crossed the river and resumed work and found marks up the creek, along the spur and Dig Fodder Stack, which also were the same kind of marks as he found on the north side of the river, made by the same instrument and in the same manner, and at the same time, and that any man could satisfy himself that the line ran up that way.

On page 560 he says that the trees marked on the north side of the river between tree 29 and the creek ran in a

westerly course; that the maple and chestnut were marked going down the river and that the gum was marked on the opposite side. On page 560 he describes how surveyors mark trees, and what these marks indicate, and states on 561 that the marks on the gum indicated that the marker crossed the river and went up the creek.

He then states that the Ocoee map shows that the line runs up the creek, and on page 562 that no grants in Monroe County, Tennessee, call for a crossing of that creek.

Francis Lovingood, record 565, speaks generally of the marks up the creek.

C. L. Slagel, a surveyor and witness for the complainant, whose testimony begins record 753, states in the first place that with the notes they found some of the trees indicated at the ends of the miles with old marks on them as old as 1821, and speaks principally of the birch at the end of the 67th mile, the sycamore at the end of the 68th, the birch at the 70th mile; all with old marks on them as old as 1821, and likewise with reference to the poplar at the 72d mile.

That he examined the Hangover with care and found no marked trees (State line trees), on it.

H. S. Hayes, for the complainant, a surveyor, whose testimony commences at 791 of the record, and consists of the testimony taken in the *Hebard v. Belding case*, adopted by stipulation in this case.

He states that in the territory which was in dispute at that time, consisted only of the Slick Rock Creek dispute; that on the Slick Rock Creek line they found 41 trees that are taken notice of in the decision of the United States Circuit Court of Appeals in the case of *Hebard v. Belding*, 103 Federal Reporter, 541. He further says that the marks on Hangover were not made with the same kind of axe that the marks on the 41 trees were. That the marks on Hangover were made with an axe such as Piercey, an old surveyor of Cherokee County, used. That there were no marks on the Hangover Ridge earlier than 1852. That his tree No. 1 was about one pole west of the creek.

J. C. M. Bogle, one of complainant's witnesses (record,

THE SURVEYS.

The two principal witnesses for the complainant are D. B. Burns and S. S. Gannet. To take these up in their order, Burns (commencing record, 226), states in the first place his education as an engineer and surveyor, and next his experience, and on page 227 states his experience in retracing old lines that have been found marked, and that involved a comparison of other statements with the actual work on the ground, and that ever since he was sixteen years old he had been in the habit of going out into the mountains with his father, who is a lumberman, and that he is familiar with land surveying and with old land marks.

On 228 he states that he commenced his survey in April, 1908, and used a transit, and on the next page, in answering the question as to whether he discovered land marks and marked trees along the line which he surveyed, he answers that he did, and explains what those marks were; that they were State line marks, and states that a person who had been in the habit of tracing up old line marks can tell whether they are State line marks or not from the appearance of the marks, and adds that if the axe mark did not pass entirely through the bark, that the only way to tell the age of the marks would be their appearance.

He commenced his survey from a point about 3 1-2 miles north of the Tennessee River and surveyed from that point to the Unicoy Turnpike to the 101st mile post, a distance of forty-two or forty-three miles. When he began the survey on the Smoky Mountain he took an observation on the North Star in order to determine the true meridian north and south. That he surveyed about six miles and took another observation on the North Star, and checked his work by the various angles from the first observation, and then continued the survey to the junction of the Hangover Ridge and Big Fodder Stack Ridge and took another observation at that point and found that all his calculations checked with each other. That he checked his work from the State Road on the Smoky Mountain to the junction in three different places and was perfectly satisfied that his work was correct.

On page 230 he states that about a year afterwards he surveyed another line, an accurate transit line, from the junction over Stratton Bald, down the main ridge to the Cheoah River, and down Cheoah River to Slick Rock Creek and tied on to the line he had run the preceding year, and found in the entire circuit practically no error at all.

That this last survey covered a distance of twenty-five miles and that the only error in that circuit was about fifteen feet, and that this was an absolute check on the accuracy of his prior work. That he ran a base line down the Cheoah River and likewise the Tennessee and other streams. That he surveyed Slick Rock Creek and Cheoah River. That his plat shows a system of co-ordinates; that those lines or squares as they appear on the tracing are drawn out at the distance north and south and east and west by the true meridian, and represent the true north and south and the true east and west. That these lines are a distance of five thousand feet apart and represent what would be known to any engineer as the co-ordinate system of platting lines. He then explains that what he means by that is that every point on that map has a distance which is figured from the axis whose crossing is the origin of that system, that is a given number of feet from the east and west axis, or a given number of feet from the north and south axis, the distance being due west or due east, or due north or due south from the point called zero or origin; and that this system of squares insures accuracy of platting and it is impossible to make an error that you cannot detect.

He then explains the system of tree marks that was used by the Commissioners, and on page 232 their significance. In making this survey he had with him the plat, or map of 1821. He then goes on to state about the first tree or two that he blocked and introduced in evidence as block No. 1, taken from tree No. 13, a white oak, and states that this block No. 1 shows that the tree had apparently been remarked and that it showed both the old and the new marks, and this block is offered in evidence.

On page 234 he explains that when he got to the river that he took the map of 1821 and went to a point on the north side

of the river opposite the mouth of Slick Rock Creek at an elevation of four or five hundred feet, from which position he had a splendid view of the whole Slick Rock Creek basin and all of the principal peaks, the Big Fodder Stack, Little Fodder Stack, Hangover, and the whole Slick Rock Basin.

That he noticed from the original map a distance of six or seven miles south of the river a practically straight course and then a decided break to the left. That he took his instrument opposite the mouth of the creek and set it up upon the same bearing taken from the original map, and found that the bearing took him right over Big Fodder Stack. He had been led to believe from information before he got to the ground that the line went over the Little Fodder Stack, and he expected to find the line there; but, after using the compass in that test, he found that it went over Big Fodder Stack, and he then abandoned the idea that the line could have gone in any other direction than up Slick Rock Creek and over Big Fodder Stack.

He then began his investigation for marked trees. He drew a line from the mouth of the stream marked "creek" to that first decided angle to the left, and after ascertaining that bearing, set his compass on that bearing and found that it carried him over Big Fodder Stack, and that that gave him the idea that the line ran up Slick Rock Creek. That the line on the north of the river trends southwest in its undisputed part, and as you go down on that course you can see right in front of you the Big Fodder Stack. He then speaks of finding tree 29 and states that the marks that they found on the line north of the river corresponded in general appearance and in appearance as to age. That he went up the Slick Rock Creek 4.9 miles, finding a number of marked trees. In the first two miles they were plentiful.

He continued the survey up the Slick Rock Basin to Big Fodder Stack Lead, finding also a number of trees, one of them a fore and aft tree, and then introduced in evidence block No. 4 from tree 41. He found marked trees on the Big Fodder Stack Ridge, the Big Fodder Stack, and from Big Fodder Stack up the Junction, and in that space found twenty-six trees—undoubtedly State line trees. He then con-

tinued the survey from the Junction to Laurel Top and found quite a number of State line trees between the Junction and Laurel Top. From the Junction to Laurel Top the line is undisputed. The survey was then continued from Laurel Top to Jenks Knob, but he found no trees between Laurel Top and County Corners. From County Corners he surveyed southwest down the State Ridge and found along the State Ridge to Tellico many State line trees, and among others just across the Tellico River found tree 107, which has been designated as the 86th mile tree, which on page 241 he says was marked on the right hand as you go to Jenks Knob. This holly tree, the 86th mile tree, stands about a thousand feet from the Tellico River, and between County Corners and Jenks Knob there are eighteen State line trees.

On 242 he says that the State Ridge tallies with the map of 1821. On the same page he says that he went, after completing the survey to Jenks Knob, with Mr. Gannet to the 101 mile post, where the Unicoy Road crosses the State line, and from that point they ran a joint survey of the line to Jenks Knob and tied to the line that he had previously run in March.

That the most of that ridge is barren and has been cleared of timber, though they found seven or eight trees along there that were State line trees, and that he also found one fore and aft tree on the line south to the Georgia line and produces the block No. 10 from tree 21, which counts and demonstrates that it was a State line tree.

On 243 he then speaks again of the survey that he made from the Junction back over Hangover and states that he found no State line trees on the Hangover line. He describes the ridges to Cheoah and to Slick Rock Creek. On the north of the river he began his survey at the Smoky Mountain Road, while Mr. Gannet surveyed from there back toward the Gregory Bald and stopped at the 59th mile tree, and states that from there (record, 246), the exact measurement is 6.02 miles to the south side of the Tennessee River at the mouth of Slick Rock Creek, so that their 65th mile falls in the Tennessee River, while the distance from the 59th mile tree to the south side of the Tennessee River as claimed

by the State of Tennessee is 5.47 miles, and from there to the Junction by the Slick Rock Creek from its mouth is 10 miles and 16 miles to the Junction from the 59th mile tree, while it is only 14 by the Tennessee contention.

On page 247 he gives the bearings according to his survey and as compared with the map of 1821. This survey was carefully made and checked over, and as we shall see, Gannet, when he comes to testify, states that in his testing of Burns' work, he found it the most accurate that he had ever seen in that kind of rough mountain surveying. The outcome of this survey of Burns' is exemplified by the various maps which will be hereafter listed with the pages of the record where they may be found.

S. S. Gannet, another witness for the complainant, whose testimony begins at 408, is an employee of the United States Government in its Geological Surveying Department, with the title of Geographer. On 409 he gives his technical acquirements and then goes on to detail his practical experience in such work, and on page 409 states that from the year 1882 to 1886 he did work in the western part of North Carolina, and further has knowledge of trees and marks upon them, or that bear upon the question of surveyed lines and the indications of those marks.

At the top of page 410 he states his further experience in this particular kind of work, as follows:

"In 1897 I was detailed to the Indian Bureau of the Interior Department to locate the intersection of the 107th meridian with the Colorado-New Mexico boundary line by means of the marked line; and again in 1898 I was detailed to assist in the work of locating the boundary line between Montana and Idaho, starting where a certain meridian crosses the Bitter Root Mountain, and established that by astronomical observations. In 1908 I was engaged throughout the season in remarking and retracing the boundary line between Idaho and Washington for a distance of about 120 miles," and further:

"On May 31, 1910, I was appointed by the Supreme Court of the United States as one of three commissioners to mark the boundary lines between Maryland and West Virginia.

The case was decided in May by the Supreme Court, and I was appointed as mediator representing the United States."

On page 411, he was asked how he happened to be connected with this matter. He says the Attorney-General of North Carolina requested the Geological Survey to investigate that question and to find out if possible where the original line was run and marked; and "I was selected by the director of the geological survey to engineer the work."

In reference to the directions as to what he should do, he says: "I was to actually go on the ground and find out from my knowledge of the country and experience in such matters where the original line was actually run and marked." And further, "It was my duty to find out the truth about where the line was run, regardless of whom it affected."

In detailing his action upon the ground he says he first went to Murphy, North Carolina, and started from that place and went first to the 101st mile post, where the turnpike crosses the Unicoy Mountain and that he then ran a line southward. On that part of the survey he was accompanied by D. B. Burns and some other men. A Mr. Hugh Sadler of Tennessee showed him where the 101st mile post was, and accompanied him down the line.

He made an investigation in the vicinity of the 101st mile post to determine whether the position designated was the correct one, which resulted in his conclusion that it was correct. He participated in taking a block from the tree about 500 feet south of the first mile. He was acquainted with the State line marks. From the 101st mile tree he ran a line northeast, which he was able to identify by the marked trees and the plat Exhibit "D," a copy of which is introduced into this case so signed by him in connection with Burns.

This witness had with him the 1821 map, and on the way from the 101st mile tree to Jenks Knob he found 12 State line trees. He then surveyed down Jenks Ridge and up the State Ridge and found State line trees. Between Jenks Knob and County Corners 20 State line trees. From Jenks Knob to County Corners he made his own survey entirely independent of Mr. Burns and this survey was made with the same

instrument that he used in surveying the line between Idaho and Washington and employed exactly the same methods which were approved by the United States Government, and they proved that Mr. Burns' survey was correct. That in making this survey he used a different method from Mr. Burns so as to check his work, but the results tallied.

He states with reference to the Tellico Country that if you follow the course of the plat of 1821, you have to cross the Tellico River, and that he learned from personal examination that the angles on the plat and the marked line agree. That for an undisputed portion of the line to the Junction he did not retrace the line, as he had been over that part of the work in 1883 and 1884 and had been on Haw Knob and other high points on that ridge. He then went to the Junction where he was joined again by Burns.

That from the Junction to the Stratton Bald and along Hangover he found no marks, and continued his investigation of that ridge to the Tennessee River, looking very carefully for State line trees, but found none. That the sourwood was the only one that by any stretch of the imagination could be called a State line tree. That it was impossible to tell its age and he would say that the marks on it were placed there promiscuously, and without any regularity. There was one place which appeared to be a blaze and a hack, and another two hacks above a blaze, and another three hacks above a blaze, but the hacks were not old enough.

He then went from the Junction along Fodder Stack and down Fodder Stack Lead to the forks of Slick Rock Creek and then to the mouth of Slick Rock Creek, and between there and the mouth of the creek found a number of trees well marked, which gave every appearance of being State line trees. That he went out on to the Little Fodder Stack but found no indications of the State line there. On the top of the ridge leading from Big Fodder Stack to the forks of Slick Rock Creek he found a hemlock tree which had old State line marks on it, but further down the ridge there were no suitable trees for being marked, or if there had been, they had been destroyed by fire. Just above the mouth of Slick Rock Creek he found several well marked trees, some

of which had been formerly blocked by other surveyors, and there were eight trees above the forks of Slick Rock Creek that he could identify. That from the forks of Slick Rock to the mouth is little less than five miles.

After finishing the examination up there, he went along the creek down to its mouth and found several trees near the mouth of the creek. All of these trees that he speaks of, he says (record, 417) were marked like other undisputed State line trees, and marked with the same instrument. He found 26 trees between the Junction and Big Fodder Stack, 10 from there to the forks of Slick Rock Creek, and 11 from there to the mouth of Slick Rock Creek; 47 trees in all, which in his opinion were all State line trees. That his survey carried him from the Slick Rock Creek line, and the marked line carries you the same way. To start with, he says the timber on Hangover Ridge is scrubby, but below the Hangover Peak the timber is good, and would have been suitable for marking in 1821. That the timber was good at the Sourwood Gap and he found a number of trees along there that would have been suitable for retaining the marks. That he examined all these trees with care but found no marks that indicated that they were State line trees. That there were one or two that had been marked promiscuously.

This witness then, after getting to the mouth of Slick Rock Creek, crossed the river and followed the line along the Smoky Mountain north of the river to the 59th mile post, and from the crossing of the road, or the commencement of Mr. Burns' survey, to the 59th mile post, he surveyed personally and Burns was not along. It is on page 418 that he said, speaking of Burns' notes: "His notes, as well as the body of the plat which he made, and the plat of 1821, and my notes were compared right along." And it is here where he says, "I would say that I found his work certainly the most accurate work I ever had dealings with, especially considering the fact that it was in such a rough country. I have never known work to be so accurate in such a rough country."

Going back again from the 59th mile tree, he says they followed the undisputed line southwestwardly, finding

marked trees exactly like those he found below, and that sighting along from the northeast side of the river in the direction of the Tennessee River by the course of the line, the Big Fodder Stack is a prominent peak in the line, and it would be natural for surveyors following the main ridge to take the Big Fodder Stack as an object to which they would go on the other side, and that surveyors would naturally select the Fodder Stack. And from the northeast side of the river it appears that the Slick Rock Creek and Big Fodder Stack lead directly to the summit on the other side, and that this line coincided very closely with the plat of 1821, the other route being entirely too far to the left or east.

They found tree 29 and observed that just across there is a very steep bank, almost inaccessible, 800 feet high, and spread out up and down the river three quarters of a mile, which made it not a practicable route because it was too steep, and it was practically impossible to survey a line up and down that bluff. He then speaks of tree No. 30 and states that it was evidently a State line tree. This was on the way down to a point opposite Slick Rock Creek going from tree 29.

He then says that the Fodder Stack Ridge averages higher than the Hangover; that the latter is more broken and there are more deep gaps in it. On page 423 that the Fodder Stack is the leading ridge on the south side of the river, and has a greater average altitude and continuity. Hangover is much more broken.

On 427 he says that the Burns and Gannet map corresponds exactly with the data obtained upon the ground and that the marked trees were all on the North Carolina contention and none on the Tennessee contention, and states further that he found tree No. 30 and that it is a State line tree.

He then goes on to give a lot of details as to the distances and states on 429 that the stream marked creek on the 1821 map could only be Slick Rock Creek; that the Cheoah River is more than a mile and a half to the east and could not possibly be the stream marked "creek." He gives the difference in the angles.

There are a number of other surveys that have been made by surveyors who have testified for the complainant, some of

which were made for use in the Hoard case, and other new surveys, but these two surveyors went more carefully and more accurately over the ground and in their testimony and in the maps filed are much more minute and definite in their conclusions, and it will only be necessary we think to allude to the fact that these surveys by Collett (record, 547), Chambers (551), Crisp (562), Lovingood (565), Slagel (733), Hayes (794), Bogle (812), Hyde (825 and 833), Carver (850 and 854), all found the line to be on Slick Rock Creek and as claimed by the State of North Carolina.

Of the surveys made by Burns and Gannet, we may say that these gentlemen went there to ascertain where the commissioners actually located the line. In following down the line on the north side of the river, certainly as far as the 64th mile tree, there was no ground for an error, and from that point there could have been nothing more natural, having the map of 1821 before them showing the shape of the line, than to go to Slick Rock Creek. Looking over on to the southwest side of the river, it was impossible to conceive that a line of that shape could go over the Hangover Ridge, and it was impossible to conceive that the stream marked "creek" to the right meant the Cheoah River a mile and half away to the left, and that following the Cheoah River for any distance could ever tend to land the surveyor at the Junction, where again the line became undisputed.

The shape of the lines indicated the path, if you take nothing else. A curve to the right going to the mouth of Slick Rock Creek, or any other point to the right, and at seven miles, taking a turn to the left and reaching the Junction, could never fit a curve starting opposite tree 29 and turning to the right at entirely different angles.

Hangover Ridge having been described by these witnesses as not the main ridge at all, and that the ridge to the Cheoah River is the main ridge of that ridge, and the description of the Hangover Ridge for several miles south of the river as being only a gradual ascent broken by deep gaps at many points, certainly would justify the selection of the Fodder Stack Range as the outlet to the Slick Rock Creek and as the easiest way to get to it. The shape of the line itself points

inevitably to that conclusion. And, when these surveyors on further investigation discovered that the line up this stream marked "creek" along to the Junction and from there down to the 101 mile tree is well marked and refer to the fact that the Commissioners stated that they had marked the line, and furthermore, after careful examination finding no State line marks on the Hangover Ridge, and in this latter regard it is more than likely that they are entirely correct, because Williams, defendant's witness, said that he never saw any trees on that ridge that satisfied him that they were State line trees, how could these surveyors come to any other conclusion?

So far as the surveys of Hale, Wilson, Muller, and Williams are concerned, we have already stated that in our opinion all of these surveys were dominated by Hale and adopted his views.

We treat Kent, one of defendant's witnesses, as a negligible quantity. This man's testimony is found commencing in the record at page 1,489. Crisp, one of our witnesses, was with Kent, who was employed by the Babcock Lumber Company.

Crisp says that they went on to the north side of the river; that they had no instruments along with them, and that Kent took a straight stick and sighted backwards on the undisputed line and then turned and sighted in the same general direction across the river, and that his line of sight across the river struck the Big Fodder Stack. That thereupon they went across the river and investigated the Slick Rock Creek contention, and as a result of it, Kent said that the line must have run along the Slick Rock Creek and that he would so report. He is brought in to testify and denies that he said he would report that, and in fact adds his testimony to the other witnesses for the defendant that the line must have been run along Hangover Ridge, because, for the unique reasons that he could not see why it should go anywhere else and because his line of sight to the south struck Big Fodder Stack. That that is an additional reason that he thinks the commissioners chose Hangover Ridge.

He admits that he did use a stick in making sights, but just what degree of straightness that stick had, and how near

in turning around he got on to the line of sight, and how steadily he held the stick, we have no means of knowing.

At page 1,495 he says that he was mainly looking for a main ridge and that Hangover appeared to be higher and bigger to him than any other, and that he could not get into his mind that Fodder Stack was the main ridge; but on page 1,497 he admits that he did find a tree, which was apparently a State line tree, with three hacks on it, eighty-seven years old. On 1,499 he says the most reasonable and probable route seemed to be to cross over at tree 29 and go over the Hangover to the Junction. On 1,501 he says that Hale's and Burns' maps both seemed to be right in direction from Knob to Knob and in measurement.

On page 1,505 he admits that he first thought that the Little Fodder Stack Ridge might be the main ridge. On 1,507 he states that the Cheoah River Ridge is the main one for a mile or two, but the peculiarity of this gentleman's testimony is on page 1,510. He was asked if he made a report of his conclusion to Mr. Shields, who was the attorney for the Babcock Lumber Company. He was asked this question.

Q. Did you report to him that it went over Hangover? A. I reported to him what I found.

Q. Did you give any information as to where the State line ran south of the river? A. I reported my findings.

Q. Did you report that it went over Hangover? A. I think I told him I thought so.

Q. Do you remember what you reported? A. Not absolutely.

Now here was a matter that this witness knew was the subject of great discussion and litigation, and of interest to two sovereign States. This testimony of his was taken on January 7, 1911, and he had made his investigation about the middle of June 1910 (record, 1,491), or thereafter, and he had made a written report, and yet did not remember and could not tell whether he reported in favor of the Hangover location or not. But, after answering the questions as already indicated, on further pursuit, he says: "I reported my opinion." And, in answer to question 175, page 1,510, he says

he must have reported the Hangover line, because that is what he found.

The testimony of W. D. Hale, the defendant's principal witness, is justly subject to criticism. The man is not a very safe guide who stood on the Smoky Mountain on the north of the Tennessee River and surveying with his eye the topography of the country across the river, and with his eye picked out the locality of the State line, regardless of his own survey, and makes everything bend to his own caprice, disregarding all courses and distances of the map of 1821 and the shape of the line, which is evidently not over the Hangover Ridge, and all marks; and who still in the face of all the evidence to the contrary adheres stubbornly to that first impression, not only at the Slick Rock Creek locality, but in the Tellico River country, where not only the shape of the line and the absence of all marks, but the great overplus of distance around, and the fact that you miss the 86th mile tree, an undisputed point, by a mile and a half, all concur in excluding any line as contended for by the defendant, and then attempts to disprove the Davenport notes by ignoring every natural object and every mark and every indication of the 1821 map, and in a way not customary with surveyors in using old maps and notes, and in a way manifestly unfair according to the testimony of John L. Williams, his companion in that work (record, 1,590). He surely can be justly charged with having warped his judgment by a strong bias arising from his first impression, which he is unwilling to allow to be affected by reasons too strong to be disregarded.

Nothing can be clearer than that Hale picked out ridges only. That those ridges were selected by him, not with reference to where the line actually was located, but where it ought to have been located, and he locates it there and nothing can convince him to the contrary, and his refuge, when every other consideration points to some other locality, is in his assertion that the commissioners went along and marked that other line, but that they abandoned it.

We hope we do not use too strong language when we say that this man's testimony is unworthy of consideration, and that all of the testimony that is grounded on it falls with it.

The witness John L. Williams for the defendant, was not willing to follow Mr. Hale in all of his conclusions, and was forced to admit that if he found the marked line, and was sure of the marks being State line marks, and they were along Slick Rock Creek and the spur from Big Fodder Stack and State Ridge, these together with the notes of Davenport and the map of 1821 would have forced him to conclude that the North Carolina contention was correct.

TRADITION.

The land district in Tennessee in the neighborhood of the Slick Rock Creek contention, was called the Ocoee Land District, and in 1807, by legislative direction, the Commissioners of that land district sectionized it, and according to the map that they filed, which is in evidence (Record, 88) Slick Rock Creek was the eastern boundary of Monroe County, Tennessee, and the Ocoee Land District at that point.

Some evidence was given for the defendant, that although the Commissioners of that district filed this map as the official record of the district, yet in fact they did not intend to make Slick Rock Creek the eastern boundary line. The idea was that the land over to the eastward was very wild and uninhabited, and they were tired out and they simply located it over and intended the Hangover Ridge for the eastern line. But the fact remains that according to the documents that they filed publicly they did not so lay it down. This fact was considered by both Courts that decided the case of *Hebard v. Belding*, as having considerable weight and did not seem to pay any attention to this explanation, and in fact, the referee in his case said that the reasons given were not satisfactory to him.

The Court in the Hebard case also noticed the fact that from about that time on until about 1882, there was a tradition that Slick Rock Creek was the dividing line, but seemed to think that it was engendered by the Ocoee Land District map. With all due deference to the Court, we think that

that is an error, and that the map itself so fixed the line on account rather of the tradition than vice versa; and in fact, at about that time, in 1837, there must have been a considerable number of people living who knew where the line had been located, and when papers were in existence which authenticated that knowledge. In other words, that the tradition and the map were the product of a knowledge that the line was located on Slick Rock Creek.

The parties who are interested in the lands in the Slick Rock Basin under grants from the State of North Carolina paid taxes to that State from the year 1860 (see stipulation, record, 782), and Judge Clark in the original opinion in the Circuit Court in the *Hebard v. Belding* case, stated that the occupation by them and the payment of taxes, and the Ocoee Land District map, might have created an estoppel, but that the State of Tennessee could not be estopped. That was true in an action between private parties, but in a case like this of original jurisdiction, where a State can be sued without the leave or license of the State itself, would not the doctrine of estoppel apply? In other words, in a case where a State may be sued, even against its will, is it not the fact that the ordinary rules of law must be applied, as in private litigations? This would seem to necessarily follow, because the freedom from estoppel arises from the same principle that governs the freedom from being brought into court to defend an action, but after all it is not a question of estoppel.

Those matters were only sought to be used in that case as cogent evidence that the State of North Carolina was correct, and of that fact they are evidence.

In the Hebard case, the Court of Appeals also decided that the evidence as to the declarations of old residents, both of Tennessee and North Carolina, were admissible on the point of the location of the line. Commencing on page 155 of the record and extending to the commencement of the testimony of D. B. Burns, on page 226, there is the testimony of a large number of witnesses, who heard old residents who knew about the location of the State line declare where it was.

The first one is N. G. Phillips, who knew one Thomas C. Tatham very well, who at the time of the giving of the testi-

mony had been dead a good many years. That Tatham had declared to him long before any litigation arose over it, that he was with the Commissioners and that the State line ran up the Slick Rock Creek and then up a ridge and over the Big Fodder Stack, and on page 157 that he explained exactly how they got across the river, and that Piercey, an old county surveyor of Cherokee County, was so told and had always acted on it. That he had heard other men (giving their names) say the same thing. On page 159 that that was the general reputation. And on that page, and page 161, says that the Tennessee contention was never talked about until about fifteen years before that, and that Graham County had exercised jurisdiction over that whole territory.

William Jenkins (Record, 165) talked to a man by the name of Foster, who was with the Commissioners, and who stated the same location and located the line along the State Ridge also.

David A. Hyde (Record, 169) knew Tatham and heard him tell Piercey that the State line was up Slick Rock Creek and over the Fodder Stack. This was in 1855.

N. F. Cooper (Record, 172) heard various old citizens long since dead, say the same.

Ropetwister (Record, 174) heard it described by old citizens and also states that the Cheoah River was known by that name when he was a boy.

William Williams heard the same from old citizens and says that the line was never in dispute until about fifteen years ago. Many of those whom he had heard were citizens of Tennessee. And, on page 182, he says he heard Levi Mashburn talk the same way. This Mashburn was with the Commissioners.

James Williams heard the same.

W. P. Taylor (Record, 186) knew Tatham well and Tatham told him the same, and others.

V. E. Grant (Record, 190) tells the same story.

E. W. Harrison (Record, 196) gives instance of where old people had told him the same.

O. P. Williams says the same.

Commencing on page 204, the same evidence of tradition with regard to the Tellico dispute is gone into, and the old people fixed that upon the State Ridge.

John Dockery heard old Billy Graves and old Bill Allen speak of the State Ridge as the line, and that the State Ridge had that name from the time he was a boy. He was then seventy-four years of age. Both Graves and Allen said they were along with the Commissioners and he never heard the line disputed until Fain got into litigation about it.

E. R. Hunsucker (Record, 219) had known the State Ridge by that name fifty or sixty years. Knew William Graves well, who told him that he was with the Commissioners; that they crossed Tellico and that State Ridge was the line.

Isaac Lovingood (Record, 221) says substantially the same thing.

D. W. DeWeese knew Graves very well, who said he was with the Commissioners and he pointed out the line to this witness on the State Ridge. That he had known the State Ridge by that name for sixty years.

Many of these witnesses speak of the payment of taxes to the State of North Carolina, service of writs issued by the courts of North Carolina in the disputed territory, and the fact that the children went to school in North Carolina, and especially down on the Slick Rock disputed grounds, the fact that many Tennesseeans evaded the justice of Tennessee by running across Slick Rock Creek and locating.

Commencing on page 863 and continuing to page 886, will be found the testimony of Dare Orr, Samuel Sneed, J. S. Maroney, Samuel Henry, J. W. Patten, James McDaniel, John Dockery, N. L. Brittain, James Whitaker, W. P. Jones, W. P. Phillips, Stephen Whitaker, C. C. Jones and R. B. Mashburn, all to the same effect.

Commencing on page 1352, there are more who have testified for the defendant; also on 937, 964, and from 981 to 991 and on 1027 to 1029 and 1077. But we believe that it is quite evident that these witnesses have confused the later tradition, which is mentioned in the decision of the Circuit Court of

Appeals in the case of *Hebard v. Belding*, where they say that after 1882 the tradition became divided. There are none of the defendant's witnesses who speak of having heard of the location of the State line from any persons who were present when it was located. For these reasons we do not hesitate to claim for the evidence of that character for the complainant much more weight than the testimony of the defendant's witnesses is entitled to, and feel that the evidence of tradition is strongly corroborative of all the other evidence in the case for the complainant.

In connection with the above, the vast number of grants and entries in the State of North Carolina, mentioning the Slick Rock Creek as the State line, and other grants around the waters of the Tellico River, which entries and grants extend from pages 89 to 154 of the printed record, and the fact that no Tennessee grants or entries were ever made until 1882 that extended to the eastward of Slick Rock Creek, form a part of the traditionary evidence.

Respectfully submitted,

THOS. W. BICKETT,
Attorney-General of North Carolina.

THEO. F. DAVIDSON,
C. B. MATTHEWS,
Of Counsel.

EDWARDS & BROUGHTON PRINTING CO., RALEIGH, N. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4—ORIGINAL.

STATE OF NORTH CAROLINA,
COMPLAINANT,
vs.
STATE OF TENNESSEE,
DEFENDANT.

IN EQUITY.

Brief for State of North Carolina, Complainant.

THOMAS W. BICKETT,
Attorney General of North Carolina.

THEO. F. DAVIDSON,
F. A. SONDLEY,
C. B. MATTHEWS,
Of Counsel.

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GENERAL STATEMENT.

By an Act of the General Assembly of North Carolina, in the year 1789, (Revised Statutes of North Carolina, 1837, Vol. 2, page 171), the State of North Carolina ceded to the United States all that territory now constituting the State of Tennessee, and on the 29th day of July, 1790, caused to be executed a formal deed in pursuance of that Act, which was accepted by the United States, (Laws of U. S., Vol. 2, page 85, old edition of 1815).

In that Act, generally known as the "Cession Act," and the

deed made in pursuance thereof, the boundary line is generally described as follows:

"Beginning on the extreme height of the Stone Mountain, at a place where the Virginia line intersects it, running thence along the extreme height of the said mountain, to the place where Watauga River breaks through it, thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same, thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain, from thence along the extreme height of the said mountain, to where Nolichucky River runs through the same, thence to the top of the Bald Mountain, thence along the extreme height of the said mountain to the Painted Rock, on French Broad River, thence along the highest ridge of the said mountain to the place where it is called the Great Iron or Smoky Mountain, thence along the extreme height of the said mountain, to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota, thence along the main ridge of the said mountain, to the southern boundary of this State."

At the dates of the said Act and the deed, that portion of North Carolina west of the Blue Ridge was practically unsettled, except a small portion along the French Broad River, and was, and is yet, exceedingly mountainous in character, some of the highest mountains east of the Rocky Mountains being within its borders. That portion of the boundary line now in controversy was in a country that remained unsettled and unexplored until after the year 1821, and even now is a mountain wilderness.

After the State of Tennessee was formed, Commissioners were appointed by both North Carolina and Tennessee to settle and establish the boundary line between the two states. They did so and their work was adopted.

Some twenty-five years ago disputes began to arise about certain portions of the boundary line, and disorder and unseemly strife resulted from the assertion by both states of jurisdiction over the same territory. Taking notice of these

conditions the General Assembly of North Carolina in 1909 passed an act empowering the Governor to institute in the Supreme Court of the United States such proceedings as might be necessary to establish and protect the boundary lines between North Carolina and adjoining states. By virtue of the power thus conferred the Governor of North Carolina directed her Attorney General to bring this suit. Accordingly it was begun.

As briefly as we may, we will now outline the origin of the controversy, the contentions of the two states and the evidence tending to support these contentions. The record is quite voluminous and for the convenience of the Court we have made with considerable care a complete abstract and analysis of the evidence which we file under separate cover.

We apprehend that it will be also helpful to the Court to schedule at once the maps which are a part of the record in this case, and which may be briefly described as follows:

Facing page 50 is a copy of Hale's map, as used in the case of *Hebard v. Bobbing* and others, mentioned in the answer of the defendant.

Facing page 52 is a copy of the map of 1821 attached to the answer.

Facing page 84 is another copy of a map of 1821, used by the complainant.

Facing page 88 is a copy of the map of the Ocoee Land District, alluded to in the evidence and argument.

Facing page 250 is complainant's Exhibit "B," showing a comparative map of the line as shown by the plat of 1821 and the lines respectively claimed by the complainant and the defendant, and was made by Burns.

Facing page 252 of the record is complainant's Exhibit "C" made by Burns, showing the lines as claimed respectively by the parties hereto and the undisputed points.

Facing page 256 of the record is complainant's Exhibit "D" of the survey of H. B. Burns, showing the line as surveyed by him and schedule of state line trees located, comparison of distances, tracing of a portion of the plat of 1821, and the coordinates, and locating on the map itself the prominent points and the trees scheduled.

Facing page 264 is another copy of the map of 1821, used by the complainant.

Facing page 322 is a copy of Exhibit "D" on a reduced scale, that was used in the case of *Hebard v. Belding et al.*

Facing page 336 is another copy of Exhibit "D" used in the cross-examination of complainant's witness Burns, with elevations placed on it.

Facing page 406 is the Murphy sheet of the United States contour map.

Facing page 550 is complainant's Exhibit "F," being a survey of certain grants in the Tellico Region, made by the witness for the complainant, R. W. Collett.

Facing page 792 is a copy of the Ocoee Land District map that was used in the case of *Hebard v. Belding.*

Facing page 976 is another copy of the map of 1821, accompanying the testimony of Onley Williams, a witness for the defendant.

Facing page 1036 is a copy of the map known as the Tipton map, Exhibit "A," to the deposition of John W. Stratton.

Facing page 1044 is a map, Exhibit 1, to the deposition of Charles Seymour, one of the defendant's witnesses.

Facing page 1086 is a copy of the map supplied by Mr. Quarles for the defendant, State Archivist for the State of Tennessee, and is a map of the survey of 1799 north of the Pigeon River.

Facing page 1094 is a map supplied by the same witness, Exhibit 5 of the Hiwassee Purchase.

Facing page 1144 is a map of W. D. Hale, one of defendant's witnesses, extending from the 59th mile tree to Jenks Knob, and is his Exhibit No. 1.

Facing page 1158 is Hale's Exhibit 6, and it is a map of the Ocoee Land District in the Tellico region, non-sectionized.

Facing page 1556 is Exhibit "D" of Burns' with lines purporting to be the lines of the Davenport notes laid down on it.

Facing page 1558 is a plat prepared by the witnesses, Hale and Williams, with the Davenport notes platted on to it.

Facing page 1560 is defendant's Exhibit "CC" to the de-

position of John L. Williams, purporting to show the line as shown on the map of 1821, the plat of the surveyed line claimed by North Carolina, the plat of the surveyed line claimed by Tennessee, and the plat of the line made from the Davenport notes.

Facing page 1568 is defendant's Exhibit "DD" to the testimony of John L. Williams, being a copy of a map of Charles Waring & Company, of Knoxville, Tennessee, of East Tennessee and Western North Carolina.

Facing page 1590 is Exhibit "EE" to the testimony of John L. Williams, and is a copy of the United States Coast and Geodetic Survey of the mountain regions of North Carolina and Tennessee.

Facing page 1576 is defendant's Exhibit "FF," being Beever's map of Cherokee County, North Carolina, and in the same connection is the Nantahala Quadrangle of the Government contour map pasted on to the sheet of that same map.

The Cession Act describes the boundary line between the two states as follows:—"Beginning on the extreme height of the Stone Mountain, at a place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where Watauga River breaks through it, thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same, thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain, from thence along the extreme height of said mountain, to where Nolichucky River runs through the same, thence to the top of Bald Mountain, thence along the extreme height of the said mountain to the Painted Rock, on French Broad River, thence along the highest ridge of the said mountain to the place where it is called the Great Iron or Smoky Mountain, thence along the extreme height of the said mountain, to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Old Chota, thence along the main ridge of the said mountain to the southern boundary of this State."

The line here described traversed a wild, mountainous

country, practically uninhabited by white men, and from the Virginia to the Georgia line is 267 miles long.

It will be at once seen that the description of the line was necessarily in the most general terms and that a survey would be necessary to enable the two states and the inhabitants thereof to know on which side of the line the lands along the general course described would fall.

In recognition of this obvious necessity, the two states in 1795 appointed commissioners to settle the boundary line between them. These commissioners ran and marked the line from the Virginia border to a point on the Great Iron or Smoky Mountain on the Cataloochee turnpike west of the Pigeon River, a distance of 151 miles. The point at which they stopped is marked by a permanent stone monument, and has never been in dispute.

Under a treaty between the State of North Carolina and the Cherokee Indians a large territory in the western part of the State was to be held in reserve for the exclusive occupancy of these Indians, and the Commissioners of 1799 certify that they stopped at the point on the Great Smoky Mountains because they did not know where the Indian treaty line would run.

From the stone on the Cataloochee turnpike to the Georgia line it is one hundred and sixteen miles, and this part of the dividing line is described in the Cession Act as follows: "Thence along the highest ridge of the said mountain (Iron Mountain) to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of said mountain to the southern boundary of this State."

It is plain that no one could go along this general course and say, "This is North Carolina" or "This is Tennessee." So again, in recognition of the necessity of a surveyed and marked line, the two states in 1919 appointed commissioners to "accurately run, distinctly mark and permanently establish" the boundary line from the terminus of the former survey to the Georgia line. The General Assem-

of each state thoroughly understood that in running this line a measure of judgment would have to be exercised by the commissioners, and that differences of opinion as to just where the line ran would naturally arise. Both states recognized that the fair and intelligent way to adjust these probable differences would be to have them determined on the ground by the judgment of the representatives of the two states. Hence the North Carolina Act providing for the appointment of a commission declares: "This state will at all times ratify and confirm all and whatsoever the said commissioners, or a majority of those of each state shall do in and touching the premises and the same shall be binding on this state."

The Tennessee Act providing for the appointment of a commission declares: "Whatsoever the said commissioners or a majority of those of each state shall do in and touching the premises shall be binding on this State." By these acts the two states clearly intended to clothe the Commissioners with power to investigate the facts and so to settle any reasonable differences as to where the line should be run, and solemnly agreed to be bound by their decision.

Pursuant to the authority thus conferred the commissioners met at Newport, Tenn., on the 16th day of July, 1821. The Commissioners on the part of Tennessee were A. Smith, Isaac Allen and Simeon Perry, with Robt. Armstrong as surveyor. The Commissioners on the part of North Carolina were James Mebane, M. Stokes and R. Love, with Wm. Davenport as surveyor. On the 31st day of August, 1821 just forty-six days from the day they met at Newport, the Commissioners signed their report at Knoxville, Tenn. That report is as follows:

Report of Commission.

"To his Excellency, Joseph McMinn, Governor of the State of Tennessee:

The undersigned, Alexander Smith, Isaac Allen, and Simeon Perry, Commissioners on the part of the State of Tennessee; and James Mebane, Montford Stokes and Robert Love, Commissioners on the part of the State of North Carolina, duly appointed under

the Acts of Legislatures of the said States respectively; having met at the town of Newport, in the State of Tennessee, on the 16th day of July, A. D. 1821, to settle, run and mark the dividing line between the two states, from the termination of the line run by McDowell, Vance and Matthews in the year of our Lord 1799, to the Southern boundary of the said States, Respectfully Report, That we proceeded to ascertain, run and mark the said dividing line as designated in the 11th Article Called the Declaration of Rights, of the Constitution of the State of Tennessee, and in the Act of the General Assembly of the State of North Carolina; entitled "An act for the purpose of ceding to the United States of America, certain Western lands therein described, passed 1789; —Which said dividing line as run by us, Begins at a stone set up on the north side of the Catalouchee Turnpike Road, and marked on the West side Ten. 1821; and on the east side, N. C. 1821, running thence a southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain, and continuing Southwestwardly to the extreme height—thereof to where it strikes the Tennessee River, about seven miles above the old Indian town of Tallassee, crossing Porter's Gap, at the distance of twenty-two miles from the beginning; passing Meig's boundary line at thirty-one and a half miles; the Equanetlly path at fifty-three miles;—and crossing Tennessee River at sixty-five miles from the beginning. From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unicoy or the Unaka Mountain, striking the old trading path leading from the valley towns to the overhill towns, near the head of the West fork of the Tellico River, and at the distance of ninety-three miles from the beginning. Thence along the extreme height of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road, where a corner stone is set up, marked Ten. on the West side and N. C. on the east side; and where a hickory tree is also marked on the south side Ten. 101 m., and on the north side N. C. 101 m., being one

hundred and one miles from our beginning. From thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Highwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile; and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred twenty-three poles to the southern boundary line of Tennessee and North Carolina; making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line, marked 72 m., where we set up a square post marked on the west side Ten., 1821; and on the east side N. C., 1821; and on the south side G. The said dividing line run by us in its whole length is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree; and mile marked at the end of each mile; agreeably to the plats which accompanies this Report, and which said plats and Reports are certified by us in duplicate, one for each of said states, in the same words, marks and figures; which we respectfully submit to the Governors of the said states of Tennessee and North Carolina.

Given under our hands at Knoxville in the State of Tennessee, on the 31st day of August, A. D. 1821.

A. Smith,
Isaac Alles,
Simeon Perry,
Commissioners of Tennessee.

James Mebane,
M. Stokes,
R. Love,
Commissioners of North Carolina."

This report was duly ratified and confirmed by both North Carolina and Tennessee.

The North Carolina confirmatory act passed in 1821, concluded in these words: "The whole (line) distinctly marked

with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and 'mile' marked at the end of each mile."

If the duties of the Commissioners had been merely ministerial in passing over and marking a clearly defined line, their appointment would have been wholly unnecessary. If no error could be committed in running the course to be followed, the surveyors could have acted independently of the Commissioners. Clearly it was contemplated that the Commissioners should exercise judicial functions in *discovering, settling* and *establishing* and *marking* the line. They should locate the line in accordance with the description in the Cession Act where they found that it would run.

It appears, therefore, that the commissioners were commanded to distinctly mark the line between the two states and they report that they did as they were bidden. This line so run and marked was solemnly adopted by the two states as the boundary line between them, and in this controversy we are concerned with finding that line and are precluded from reviewing the judgment of the commissioners of 1821, in determining whether they should circle to the right or to the left in going from the top of one mountain across a river to the top of another mountain on the other side. The act of confirmation passed by the North Carolina Legislature declares that said commissioners "have run *and marked* the boundary line between the said states, *in conformity with their several instructions*"; and the act of that body providing for the commissioners on the part of that state gives these commissioners "instructions" to meet the Tennessee commissioners and "with them to *settle*, run and *mark* the boundary line between this State and the State of Tennessee, *agreeably to the true intent and meaning* of the act of the General Assembly of this State entitled 'An act for the purpose of ceding to the United States of America certain western lands herein described.'" Thus the line "settled, run and *marked*" by the commissioners was found and in the most solemn manner possible declared to be in conformity with "the true *intent and meaning of the Cession Act*."

THE CONTENTION OF THE TWO STATES.

The portions of the line in controversy between the States of North Carolina and Tennessee in this case lies southwest of the Tennessee River and embrace two areas or territories, the first being generally known and being hereinafter designated as "Slick Rock Basin" and the other as "Tellico Basin" or section. The boundary line between these two basins or areas, about seven or eight miles, is not in dispute.

The Slick Rock controversy begins on the northeastern bank of the Tennessee River at a point near the northeastern bank of the said stream, where the undisputed boundary line between the States approaches from the east and extends down near the northeastern bank of that river to a point about opposite the mouth of Slick Rock Creek, where it crosses the river to its southwestern bank at the mouth of Slick Rock Creek, and extends southwestwardly to the point marked "Junction" on the plat or map marked "Exhibit D" in plaintiff's evidence, and found on page 256 of the Record in this cause. The complainant claims that the line runs up the stream called Slick Rock a certain distance and thence ascends to the right, a leading ridge to the crest of the mountain to the point marked "Big Fodder Stack"; thence to the southwest or south following the crest of the mountain to the point marked "Junction."

The defendant, by its answer filed in the case, alleges that the line crossed the Tennessee River about one-half mile above the mouth of Slick Rock Creek and opposite a hemlock tree on the northeast side, about 100 feet from the river bank, and known as tree No. 29 in the evidence, and runs thence up the face of a precipitous hill or bluff in a southwestwardly direction along a ridge to the top of a high peak marked on the said plat "Hangover"; thence to another high peak called "Haoe"; thence turning sharply to the right to another peak called on the said map "Stratton Bald" and thence to "Junction."

The Tellico Basin or section begins at a place marked on the said map "County Corners," the complainant alleging that the line runs thence along the crest of a high ridge in a southwestwardly direction, designated in the testimony as

State Ridge or State Line Ridge, via Sandy Gap, to the Tellico River where it crosses, and thence to the top of Jenks Knob, the defendant alleging that after leaving the point called County Corners, the line turned abruptly to the south and ran for some distance to the point marked on the said map McDaniel Bald; and thence turning sharply in a northwestwardly direction, passing a peak called Rocky Knob it reached, with various meanders, the elevation or mountain marked on the said map, Jenks Knob.

It is perhaps well here to call the attention of the Court to the topography of the country, especially of the mountain range where the Tennessee passes through it. The Great Iron or Smoky Mountain to the northeast of the river is a very elevated and solid continuous range for many miles without any parallel ranges or ridges and descends abruptly by several sharp ridges from its crest to the Tennessee River, but it does not resume its general characteristic of a solid, single mountain until at about a distance of 8 or 9 miles southwest of the river, at the point marked on the said map "Junction." From Junction towards the river the mountain is broken up into a number of ridges running off at various angles in the direction of the river; among the principal of them being Little Fodder Stack and Big Fodder Stack, reaching the river below the mouth of Slick Rock Creek, the Hangover and Haoe ridges, reaching the river above the mouth of Slick Rock Creek, each one of these ridges has peaks on it of varying heights and they unite at about Junction where the mountain resumes its general characteristic of a great range.

From the Cataloochee turnpike to the 64th mile tree, about one mile northeast of the Tennessee River, the line is not in dispute. When the Commissioners reached this point they were running about south 45 degrees west. Looking from this point on the Smoky Mountains across the Tennessee River the commissioners could see the whole Slick Rock Basin and the mouth of Slick Rock Creek. To the left was Hangover. Immediately in front of them was Big Fodder Stack and to the right was Little Fodder Stack. The course from the 64th mile tree to the mouth of Slick Rock is south 75 degrees west. Here, according to North Carolina conten-

tion, the commissioners ascertained by the compass the direction of the mouth of Slick Rock Creek, but finding the direct line too rough to actually chain, they ran the line along the side of the ridge to tree No. 29, then turned down the river marking chestnut oak tree No. 30 and another tree, until they reached the point opposite the mouth of Slick Rock; and because the river could not be forded at that place, they took the course across the stream and thereupon, went down to Tellassee Ford, crossed the river to the South side; came back up to the mouth of Slick Rock and recommenced the survey; that they ran up Slick Rock Creek about five miles to a ridge leading up to Big Fodderstack; that they followed this ridge to the top of Big Fodderstack and then turning to the left followed the summit of main ridge from Big Fodderstack to the Junction where the line is not in dispute.

Tennessee, on the other hand, contends that the Commissioners went down to tree No. 29 and immediately across the river in line with the course that they were running when they reached this tree, and that they then followed a ridge that led by way of Cold Spring Knob to Hangover, and thence via Stratton Bald to the Junction.

From the Junction to County Corners the line is not in dispute. North Carolina contends that from County Corners the commissioners proceeded in the general southwesterly course they were running, when they reached this point, down State Ridge and across Tellico River and up to Jenks Knob. Tennessee contends that at County Corners the line makes a sharp turn and runs practically at right angles to the course the commissioners had been following, and goes by way of Cold Spring Gap, McDaniel Bald and Rocky Knob to Jenks Knob.

The North Carolina contentions are supported:

1. By general reputation.

2. By declarations of deceased persons many of whom were with the commissioners when they ran, settled and marked the line.

3. By acts of dominion of the two States and their conduct in regard to the matter.

4. By the line actually marked by the commissioners.

5. By the map filed by the commissioners as part of their report.

6. By the field notes of William Davenport, the surveyor for North Carolina in running the line.

1. General Reputation.

A large array of witnesses of intelligence and great age testified that by common reputation the state line ran up Slick Rock and down State Ridge, and that nothing to the contrary was ever heard until some eighteen or twenty years ago.

(Record, pages 155 to 230.)

Typical of this class of testimony is that of William Williams, seventy-seven years old, and a citizen of Monroe County, Tennessee. He testified that his father died in 1850 or 1856, and told him that the line ran up Slick Rock Creek to the forks of the Creek, and then up to Big Fodderstack and from there on to the Unaka, and that the line was never in dispute until about fifteen years ago. That old man Deputy, father of Bob Deputy, a witness for the defendant, went across Slick Rock Creek to evade officers of the State of Tennessee, and that when the officers came after him he told them he was out of the State, and they went back. That he had heard seven old people, naming them, who lived in that neighborhood and are now dead, but who were citizens of Tennessee say that the line went up Slick Rock Creek; that people who were evading the law of Tennessee lived across the creek and considered themselves in North Carolina; and that the witness himself had done this on occasion. Seventeen witnesses gave similar testimony for the State and North Carolina.

2. Declarations of Deceased Parties Made Before This Controversy Arose.

North Carolina also offers the declarations of seven disinterested men who, before there was any controversy about the matter said that they were with the commissioners in 1821 when they ran the line, and that they ran the line up Slick Rock and down State Ridge, to wit: Thomas Talbot,

liam Graves, William Allen, Ropetwister's father, David
ler, Foster, Levi Mashburn. (Record, pages
58, 187-188, 174-176, 219, 886-889, 165-166, 216, 224.)
ypical of this class of testimony are the declarations of
s. Tatham, testified to by N. G. Phillips.
Record, page 155.)

witness says that one Thos. Tatham, now dead for forty
s, told one Steve Whitaker in his presence that he, Tat-
was with the commissioners of 1821 when they ran the
and that they went up Slick Rock Creek; that Whitaker
lections of entering some land in the Slick Rock coun-
and Tatham told Whitaker he need not be uneasy about
him he was with the commissioners when they ran the
and that it went up Slick Rock Creek about four miles,
then up a ridge; that the commissioners came down to
river and could not get across and that they located a
pine at the mouth of Slick Rock and then went down to
Foster. Foster did crossed the river and came back up to the
th of Slick Rock, and then proceeded with the survey up
reek to a ridge leading up to Big Fodderstack and up
ridge to Jonesboro. Quite a number of witnesses testified
they heard Tatham make similar declarations on differ-
occasions.

William Jenkins (Record, page 146) testifies to similar
statements by one Foster who said that he was with the
veying party in 1821. The declarations of all the wit-
nesses named are shown and they all say that they
with the surveying party in 1821, and that the line was
up Slick Rock Creek and down State Ridge.

Tennessee offers a number of witnesses who say that by
tradition the line ran up Hangover and around by McDaniel
but they offer the declarations of no witness to that
who was with the surveying party in 1821.

3. Acts of Dominion.

s maintain that the North Carolina convention is sup-
ed by the acts of dominion exercised both by the State of
h Carolina and the State of Tennessee.
al sixteen years after the survey of 1821, when, accord-

ing to the testimony in this case, William Davenport was still alive, as he died in 1859, and at a time when it must be presumed that some of the commissioners who ran the line were still alive, and when any doubt about the true line could have been easily solved, Tennessee laid out its Ocoee land district and distinctly recognized Slick Rock Creek as the boundary line between the two states. The lands in this district were sectionized, and when Slick Rock Creek was reached only fractional sections were made. Defendant explains this by saying that the surveyors grew tired and that the country was rough and wild. The explanation is more pathetic than plausible. Tennessee never attempted to grant any lands east of Slick Rock until about the year 1882.

For a number of years after the survey of 1821, the North Carolina territory in this section was not subject to entry, but was reserved for the use and occupation of the Cherokee Indians, but in 1852, the State threw open these lands to entry, and a large number of entries were made and grants issued at once for the lands lying between Hangover and Slick Rock Creek, and in the Tellico section.

In all these entries and grants the State line is called for as running up Slick Rock Creek. North Carolina introduces 98 of these entries and grants and field notes.

Tennessee, by its Ocoee survey and map, as well as by its failure to grant land south of Slick Rock Creek until the latter part of the last century recognized in an unmistakable manner the Slick Rock Creek as the North Carolina boundary: North Carolina, by her State survey and map of 1837, as well as by her numerous grants made in the middle of the last century and as early as lands in the vicinity were subject to entry at all, unmistakably claimed Slick Rock Creek as her boundary.

The North Carolina survey and map of 1837, as well as grants made when lands in that vicinity first became subject to entry, just as plainly claimed to the line down State Ridge and Crossing Tellico. The courses and distances on the 1837 map show this clearly, even though some fancy sketching off the line would indicate mountains where none existed or failed to show Tellico River at the crossing.

In addition to this there is plenary evidence that the land owners in this disputed territory paid their taxes in North Carolina, their children attended our schools and they submitted to the process of our courts.

4. The Marked Line.

The surveyor who runs a line through a mountainous wilderness and does not mark it is more foolish than the man who writes history upon the sands. Knowing this, the states of North Carolina and Tennessee commanded the commissioners of 1821 to distinctly mark the boundary line between the two states and the commissioners certify that they were not disobedient to this injunction, but that they marked the whole line with three hacks over a blaze on each fore and aft tree, and with three hacks on each side line tree. The acts which adopted this report distinctly recognized that the line established was so marked. Where are these marks? A cloud of witnesses testify that at different times they have seen these marks on trees all along the North Carolina contention; but the winesses on whose testimony we chiefly rely are Burns and Gannett, men of large experience, of unimpeachable character; and the record of their work in this case is the best evidence of their intelligence and their integrity. Gannett comes before this Court as the man directed by the United States Geological Survey to find the true line, regardless of whom it affected, and Gannett says of Burns: "I find his work certainly the most accurate of any work I ever had any dealings with. I have never known work to be so accurate in such a rough country." The character and intelligence of these witnesses and the clearness and pertinency of their testimony warrant us in asking at the hands of the court a thorough and careful perusal of all that they have said on the subject.

From the 59th mile tree on the Smoky Mountains to the fore and aft hemlock one hundred feet on this side the Tennessee River, a line about five miles long, these men found twenty-nine trees which they certify bear the state line marks. Two of these trees, to wit, a hickory and a white oak, were

blocked and the cut in each tree showed that it was made in 1821.

The controversy begins at the fore and aft hemlock. From this tree to the river is only about one hundred feet. It is to be noted that no tree is found immediately on the bank of the river indicating that the Commissioners crossed there, but turning to the right down the river and following the North Carolina contention the surveyors found about one quarter of a mile from the hemlock a fore and aft chestnut oak bearing state line marks. When the discovery of this tree was made known its importance was at once recognized by the defendant and by the chief surveyor of the defendant, to wit, Hale. He went and examined this tree and finding the three hacks above a blaze on the upper side of the tree, he blocked it. For reasons peculiar, if not unfortunate, he does not produce the three hacks in court, but testifies that he left these scattered on the ground. He does produce the block after it had been split into three parts, and he says that the rings on the block count back only fifty-seven or fifty-eight years. Thereafter Burns, witness for North Carolina, blocked the lower side of the tree. He produced the entire block, three hacks and a blaze before this court, and your Honors can see for yourselves by counting the rings that the cut was made in 1821.

Witnesses for the defendant do not dispute this, but maintain that the fourth cut is a hack and not a blaze. There is no evidence that any survey was ever made in this country before 1821, and recognizing that when it is admitted that all of the cuts were made in 1821, and there is a difference of opinion as to whether or not the fourth cut is a hack or a blaze, the conclusion is irresistible that these marks were made by the commissioners in 1821, and that they at least intended the fourth cut for a blaze. It should be observed here that the block obtained from this tree by Hale showed a marking in 1852 while that procured by Burns showed both a marking of 1821 and a subsequent marking in 1852. The block procured by Burns is in evidence and speaks for itself. This witness says that he also found between tree 29 and tree 30, which is the chestnut oak just described, a stone post

bearing the state line marks and W. P. Chambers, the Tennessee surveyor, says (page 554) that beyond tree 30 he found a maple with three hacks on the north side. Crossing to the mouth of Slick Rock the evidence is that formerly there stood about twenty yards from the mouth of this creek a large pine that bore state line marks. (Record, page 167.) This tree seems to have been blown down and cannot now be identified, but it is of absorbing interest that the testimony of Wm. Jenkins with reference to this marked pine at the mouth of Slick Rock was given before the discovery of the Davenport field notes, and that when these notes were discovered they called for a pine at the mouth of a large creek. The witness Dr. J. W. Paty testifies that in 1867 he found the state pine at the mouth of Slick Rock Creek marked ten or twelve steps below the mouth of the creek and traced the marked state line down the creek to that tree. (Record, page 868.) The witness D. B. Burns found, in September, 1911, a large white pine about thirty-six inches in diameter and about twenty or twenty-five feet from the south bank of Tennessee River and the same distance below the mouth of Slick Rock Creek. This pine had then been dead for several years and had been blown up by the roots; the bark was gone from it but only one mark appeared to have passed through the bark on it and that mark was on the side toward the creek. The tree lay where it had fallen up and down the Tennessee River. (Record, pages 726-727.

Between the mouth of the creek and the point where the line, according to the North Carolina contention, leaves the river, these surveyors mad sixteen trees bearing the state line marks. Each of these trees is named and its position given on the map made by these surveyors and introduced by North Carolina. All the testimony is that the marks on these trees appear to have been made at the same time and with the same kind of instrument used on the trees along the unmarked portions of the line, and the surveyors blocked two of these trees, and in each case the rings from the exterior of the tree back to the wound show that the tree was cut in 1821. The marks on the blocked trees are identical in appearance with those on the trees not blocked.

Along the ridge from where it leaves the creek to the top of Big Fodderstack one large hemlock was found bearing state line marks identical in every respect with those heretofore described, and from Big Fodderstack to the Junction, twenty-six state line trees were found, and two of these trees were blocked, one at Rock Stack and the other at Chestnut Knob. Block No. 9 was taken from the tree No. 78 near Chestnut Knob, and is here to speak for itself. So powerful are these facts to the mind of a surveyor that Tennessee's chief witness Hale takes refuge in the theory that the commissioners of 1821 might have marked this line but that they abandoned it without obliterating the marks, if they did, while he was unable to give any plausible reason for supposing that there had been any such abandonment.

From Junction to County Corners the line is not in dispute. From County Corners to Jenks Knob there are twenty-seven state line trees. The witnesses say that these are in appearance exactly the same as those on the undisputed portions of the line, that they appear to have been made at the same time with the same kind of instrument, and witness Fain says that he blocked seven or eight of these trees, and they all showed that they were cut in 1821. Among these trees is a holly, marked S6th m., and there seems to be no serious contention that this is not a state line tree; in fact the evidence that the commissioners marked the line down State Ridge is so plenary that the chief witnesses for the defendant are compelled to admit that the commissioners actually ran and marked this line, but they say that the commissioners subsequently abandoned it. The commissioners do not so say, and if it be folly for a surveyor to run a line and not mark it, it is criminal to mark one line and adopt a totally different one. The commissioners solemnly certify that the line is marked throughout the whole length and this would seem to dispose of this imaginary line around Tellico described by some of defendant's witnesses. Nobody has ever said that there were any marked lines in the loop around Tellico, and the evidence in regard to Hangover does not satisfy one of the defendant's chief witnesses that there were any state line marks on Hangover Ridge. All of our witnesses say there

are none. So that from tree 29 to Junction and from County Corners to Jenks Knob we have indicated a line marked as plainly with fore and aft and side line trees as the undisputed portions of the line. We show on the map 80 of these trees. A list showing location of these is set out on the plaintiff's Exhibit "D" (Record, page 3301). Of these we present to the court 7 blocks, and those blocks are taken from different portions along the line, and if the commissioners ran the line by these trees that we have blocked, which blocks are here in evidence, they must have run the line in accordance with the North Carolina contention, from Slick Rock to Jenks Knob.

After the Burns-Gannett map had been put in evidence by the State of North Carolina showing the exact position of each state line tree found by these surveyors, giving the kind of tree in each instance, whether hemlock, oak, birch or holly, the defendant had abundant opportunity to block any of these 80 trees and show that they were not cut in the year 1821, and their failure to do so is tantamount to an admission on their part that these are genuine state line trees, and that they were actually marked by the commissioners in 1821.

We submit that this evidence, viz.: the traditions of the country, the declarations of deceased persons who were with the commissioners when they ran the line, the acts of dominion exercised by the two states, and the plainly marked line abundantly satisfies the rule that a plaintiff must establish his claim by a preponderance of the testimony.

And yet, we have not touched some of our strongest evidences of title—the map made by the commissioners who ran the line, and which they filed with their report, and the field notes of Wm. Davenport, the surveyor on the part of the State of North Carolina. These venerable documents advance our proof to the degree of practical certainty.

5. The Commissioners' Map.

In the report made of their work the commissioners of 1821 say: "The dividing line run by us, in its whole length, is distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree and

mile marked at the end of each mile agreeably to the plats which accompany this report, which said plats and report are certified by us in duplicate, one for each of said states."

When this controversy first arose diligent search was made for the plats mentioned both in the archives of North Carolina and of Tennessee, but without avail. The Capitol building at Raleigh, North Carolina, was destroyed by fire in 1831, and it is supposed that the records of the survey of the state line were lost in that fire. Nothing could be found in the archives of the State of Tennessee for a long time, but about the year 1903 the Archivist of that state found in a barrel in the basement of the Capitol building at Nashville, among what was supposed to be a lot of worthless papers, the original map of the survey of 1821, signed by all the Commissioners and by the surveyors who ran the line. That map has been introduced as an exhibit in this case. The scale of the map is 800 poles to the inch, and the line run by the commissioners is accurately traced on the map, but it clearly appears that the topography is simply sketched in. Mr. Burns had this map with him when he made the survey whose accuracy is so highly commended by Mr. Gannett. Mr. Burns files as a part of his testimony a map showing:

1. A line run according to the map of 1821.
2. A line run according to the North Carolina contention.
3. A line run according to the Tennessee contention.

He says that the North Carolina contention tallies with the original plat in almost every detail; that the general trend is the same, and that when you compare very small angles on the two plats they are almost identical. He says on the other hand that the line claimed by Tennessee shows altogether a different course both in the general trend and the small angles; that along the disputed portion of the line there is no similarity at all to the Tennessee contention, while along the undisputed portions of the line they are practically the same. This witness adds that taking the map of 1821 and starting at an undisputed point, it is impossible to go up "Hangover" or around "Tellico," and that the course up "Slick Rock Creek" and down "State Ridge" fits both the map and the report of the commissioners.

The testimony of Mr. Gannett reinforces that of Mr. Burns. He, too, had the map of 1821 with him and says that his survey, heretofore described, tallies almost exactly with that map; that the route around Tellico is so obviously out of the course of the map that he did not deem it necessary to survey it at all; that going northeast from the Junction the map carries you along "Big Fodderstack," and then down the ridge to "Slick Rock Creek," and down the creek to the river, and that the marked line carries you the same way. He says it is simply impossible to fit the map to the Tennessee contention.

These are the general conclusions of these witnesses with respect to the map of 1821, and the contentions of the two states. The witnesses base these conclusions on a wealth of details which are pointed out in the abstract and analysis of the evidence appended hereto. The salient points in dispute which the map settles in favor of the North Carolina contention are:

(1) According to the North Carolina contention the line crosses the Tennessee River at the Mouth of "Slick Rock Creek," and unless you absolutely disregard both the course and distance and the creek shown on the map you can cross at no other place.

(2) According to the Tennessee contention immediately after crossing the river the line runs up a ridge; the map shows that it runs up a creek for a considerable distance.

(3) The Tennessee contention is that, after crossing the river, the line makes a decided break to the left; the map shows a decided break to the right.

(4) From the south bank of Tennessee River to Big Fodderstack the bearing by actual survey is S. 44 degrees 28 minutes west; the bearing on the map is S. 13 degrees 25 minutes west, a difference of only 1 degree and three minutes, while the bearing to "Hangover" from the same point is S. nine degrees thirty-nine minutes west, a difference from the bearing of the map of 34 degrees.

(5) From the 59th mile post to the mouth of "Slick Rock Creek" on the south side of Tennessee River the actual distance is 6.02 miles; by the map of 1821 is 6 miles. To the

point on the south side of the river claimed by Tennessee is 5.47 miles. From the river to the Junction the actual length of the line running up Slick Rock Creek and along Big Fodderstack is 9.97 miles. By the map of 1821 is 10 miles. By the Hangover route the length of the line is 8.51 miles. The North Carolina contention varies from the map only .03 while the Tennessee contention varies 1.49 miles. From the 59th mile tree to the Junction, the distance via the map is 16 miles; via North Carolina contention 15.99 miles; via Tennessee contention 13.98 miles.

(6) About seven miles from the river the map plainly turns to the left; this tallies with the North Carolina contention, while according to the Tennessee contention at the same distance from the river the line turns to the right.

(7) Again at "County Corners" the line, according to the map, continues the general southwestern course down "State Ridge," while according to the Tennessee contention the line here breaks off at right angles to the course it runs in approaching "County Corners." Indeed there is no serious attempt to reconcile the course around "Tellico," either with the map of the commissioners or the marked line.

It thus appears in respect to the natural objects shown and the course and distances, the map of 1821 is in perfect accord with the North Carolina contention and is wholly irreconcilable with that of Tennessee.

Facing this array of facts Tennessee, while compelled to admit the authenticity of the map, challenges its accuracy. Burns and Gannett say that it is wonderfully accurate considering the time it was made, and that today a good surveyor can take the map and locate the true line.

It would seem that if one is not convinced by this array of proof; the traditions of the country, the declarations of aged and honorable men, made many years before this controversy arose; the acts of the two states in the exercise of their sovereign power, the silent incorruptible testimony of the trees, the map which the commissioners and the surveyors realized was to be the enduring monument of their labors in the wilderness; if in the presence of all this proof one still "hardens his heart," there is a fair presumption that his

scepticism would not depart "Though one rose from the dead." Such is even the case.

6. The Davenport Field Notes.

Heretofore we have been dealing with certain signs and marks made by the commissioners as they blazed the line through the wilderness, and with the tracing of that line upon the map filed with their report.

We come now to study the very foot prints of the commissioners. As heretofore stated when this state line first became the subject of dispute diligent search was made for the map of the commissioners and the field notes of the surveyors. After the map was unearthed the search for the field notes was continued, both sides feeling that if these could be found they would set at rest every disputed question. Individuals interested in the Tennessee contention must have felt this way for, being unable to find the notes in Tennessee, they extended the search into North Carolina. The surveyor for North Carolina was Col. Wm. Davenport who died in 1859. In his home was what we may call a famous sideboard or secretary. It was made from Crotch Walnut, that is walnut cut near the fork of the tree, and when so cut the grain shows like a weeping willow tree. The secretary was made by a journeyman cabinet-maker from timber on Colonel Davenport's land. The walnut was inlaid with holly and it was and is today a massive and beautiful piece of furniture, a treasured heirloom of the Davenport family. In this secretary Colonel Davenport kept his papers, especially papers relating to land titles, of which he had many, for he was a noted surveyor in his day. In this secretary there was a large outside drawer and inside of this large drawer were a number of smaller drawers. The secretary has remained in the Davenport home ever since it was made and the home has at all times been under the control of the Davenport family. Mr. Wm. Davenport Jones, a grandson of the surveyor, and seventy-two years old at the time of the taking of his deposition, has been living in this home since 1865. After this suit was brought by North Carolina Mr. Jones, at the request of certain parties interested in the Tennessee contention, made a

search for Colonel Davenport's field notes of the State line survey of 1821, and in a very thin drawer, a sort of secret drawer, inside the large drawer of the secretary heretofore described, the notes were found. (Record, pages 605-623.) It may be worthy of mention that those who so diligently searched for these notes do not now consider them desirable evidence. The notes are in a little book, the cover of which is thick paper or pasteboard, and this is stitched by hand through the leaves in the book. This book is presented to the Court for its own inspection. On the front of the cover is the following endorsement: "W. Davenport's Field Book, July 18th, 1821." It will be noted that in their report, the commissioners say that they met in Newport, Tenn., on July 16, 1821, and it seems that the actual survey began on the morning of July 19th, 1821. The opening words on the first page of the book are: "July 19th, 1821. Began at Cattaliche tract to run the line between the States of North Carolina and Tennessee, marked a rock there on North Carolina side N. C. 1821, and on the other side T. E. N. 1821, and runs with the line that J. M. Dowell, M. Matthews and D. Vance run in the year 1799 and runs with said line about two miles and a half to where they stopped." Then follows a complete set of notes of the survey of a line running from the terminus of the McDowell, Matthews and Vance line to the Georgia state line. (Record, page 624.) The endorsement on the cover of the book is in the proper handwriting of Wm. Davenport as are also the first three pages of the book. The remainder of the book is, in the main, in the handwriting of Colonel Davenport's wife and the evidence is that she acted regularly as his amanuensis. Here and there, all through the book, are corrections and interlineations in the handwriting of Colonel Davenport, and at the end of the book there are several pages on which the writing is all that of Colonel Davenport.

These notes were furnished Burns and Gannett who compared them with the survey made by them, according to the marked line and with the map of 1821. With these notes in hand they also made an examination of the disputed portion of the line. Mr. Burns files a map showing tracings of the

following lines: (1) Line shown by map of 1821; (2) line surveyed according to North Carolina contention; (3) line surveyed according to Tennessee Contention; (4) line from Davenport's field notes.

The witnesses Burns and Gannett testify that the line made from the Davenport field notes is practically the same as the line shown on the map of 1821, and the line surveyed according to the North Carolina contention, and that the Davenport line is utterly irreconcilable with the Tennessee contention. The call in the notes from the 64th mile tree is S. 75 degrees W. 320 poles and this will land you exactly in the mouth of Slick Rock Creek. The full call in the notes from the 64th mile is "S. 75 degrees W. 320 poles crossing Tennessee River to large white pine southside at the mouth of a large creek 65th mile." At this most crucial point the North Carolina contention is in exact accord with the course and the distance called in the field notes and the natural objects. The creek called for is undoubtedly Slick Rock, and there is evidence that formerly there stood near the mouth of the creek a large pine bearing state line marks. On the other hand, if you start from the 64th mile tree, and run 320 poles, according to the Tennessee contention, you will go out of the course and will land on an inaccessible bluff instead of at the mouth of the creek.

The succeeding calls take you up a creek for several miles and this again accords with the map, the marked line and the North Carolina contention, while there is nothing in the Tennessee contention that remotely resembles the calls on the field notes from the 65th to the 70th mile.

The evidence is plenary that in the Tellico section, the notes agree with the map, the marked lines and the North Carolina contention. There is no attempt on the part of Tennessee to fit the notes to her contention. Indeed it would seem that the parties who were so eager to find these notes would now like to forget them. A number of witnesses testify that these notes are remarkably accurate, considering the time they were made and that with them there is no trouble about locating the true line. We are frankly embarrassed to understand how the authenticity of these notes can be ques-

tioned. They were found in the secretary of the surveyor who ran the line, in the home in which he lived and died, and both the secretary and the home have been in the possession of the Davenport family ever since this survey was made. On the back of the book Wm. Davenport declares in his own handwriting that they are his field notes. On the first page of the book he states in his own handwriting that he began the survey on the 19th day of July, 1821, at the very point where the State line survey did begin. He then gives the calls, courses and distances of the line running from the beginning point to the Georgia state line, a line 116 miles and 220 poles long. The commissioners certify that the line they ran is 116 miles and 223 poles long. The report of the commissioners calls for the following objects: A *stone* on the north side of the Cataloochee Turnpike, the *bald rock* on the great Iron or Smoky Mountain, the *Tennessee River*, seven miles above the old Indian town of Tallahassee, a large creek emptying into the Tennessee River where the line crosses the river, *Porter's Gap*, 22 miles from the beginning, *Hogback Boundary line* at thirty one and one-half miles, the *Big Ivy Gap* at 53 miles, the *Old Indian Path* at the 95th mile, a *stone* marked T E N on the west side and N. C. on the east side and a *hickory tree* also marked on the south side T E N 101 m., and on the north side N. C. 101 m., a *square pine on the north bank of the Highwassee River*, a *stake* marked W. B. and E. L., *on the south bank of the river* and *a square post* marked on the west side T E N. 1821, on the east side N. C., 1821, and on the south side G. The Davenport field notes *call for*, and *carry you* to every one of these natural objects. They carry you right by the trees that are indubitably marked as State line trees, notably the holly tree at the 86th mile, which everybody admits bears the state line marks and which is called for in the Davenport notes but not mentioned in the report of the commissioners. Highly competent and entirely disinterested experts say that a map made from the Davenport notes will be practically the same as the commissioners' map of 1821. Indeed, Mr. Williams, a robust witness for the defendant, says that the courses and distances on the line shown on the map of 1821, and the courses

and distances in the Davenport field notes are practically one set, and then makes the generous concession that the man who made the map and the man who wrote the Davenport field notes had "Some similar information." We confess that our imagination breaks down when we try to conceive who wrote these notes, if Wm. Davenport and his wife, under his direction, did not. If he did write them, they are a record of the very foot prints of the men who ran and marked the line between these States.

The history of this case is a remarkable illustration of the truth of Thomas Carlyle's statement that "no error can endure to the end." In the case of *Hebard v. Belding*, the Court did not have before it sufficient facts to reach a true conclusion. The Court realized this and solved the question before it in favor of those claiming under Tennessee upon the grounds that the facts before it were not so preponderatingly in favor of the plaintiff in error as to justify a reversal of the findings of the Master. That Court did not have before it such convincing evidence of the marked line as is presented to this Court. The map of 1821 and the Davenport field notes were not before it at all. These have been unearthed since that case was tried, and it is remarkable that in both instances the truth that settles the case was discovered by the other side.

THE PRIVATE LITIGATION.

As a further preliminary, it would not be improper to draw the attention of the Court to certain private litigation, because both cases were pleaded in the answer of the defendant and portions of the records of those cases are in the plaintiff's and defendant's evidence, to wit, the cases of *Hebard v. Belding et al*, and *Stevenson v. Fain*. In the latter case, the Federal Court at Knoxville decided in favor of the line as claimed by the State of North Carolina, but the defendant pleads that it was no party to that suit and not bound by that decision, which is quite true, but on the other hand, pleads the case of *Hebard v. Belding*, which concerned the Slick Rock Creek contention of North Carolina and was decided in favor of the Tennessee contention over Hangover Ridge.

The Fain case concerned the Tellico and State Ridge territory. The State of North Carolina was not a party to the Hebard case, and therefore was equally not bound by the decision of the Court, and yet it is pleaded as if it had some determining force in this contention.

Both of those cases were decided prior to the finding of the report and map made and filed by the commissioners in 1821, and before the finding of any field notes of the surveyors who took part in that survey. These field notes of Mr. Davenport, one of the surveyors of that commission, were discovered after the bringing of this present litigation between the States. So that, in deciding these private cases, the Court had nothing to go on except the topography of the country and such evidence as there was available of the marked lines. The searching and careful examinations of the true location of said line, made by eminent surveyors, who have testified for the complainant in this case, had not then been perfected.

Having in view the meager evidence available, it becomes important to quote from the record what the judges, who successively passed upon the Hebard case, said about it.

That case was brought by Charles Hebard against Belding and others, all of the parties being non-residents of the State of North Carolina, and necessarily not as conversant with local history, traditions, and sources of evidence, as were the citizens of that State, the plaintiff claiming under a grant made by the State of Tennessee to McCroskey in 1892, the defendants claiming under a grant made to Peet and Gilbert by the State of North Carolina in 1860. The case was referred to a master, who found in favor of Hebard. When it came up on exceptions to the Master's report, in deciding it, Judge Clark of the Federal Court of Tennessee in that District (Record, page 1,384), said:

Clark's Decision.

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts

and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier and had been paying taxes upon the property, while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise, growing out of the fact that the State has, through the Ocoee District Commissioners, established its line at Slick Rock Creek and has sectionized all of the territory supposed to belong to the State. In the absence, however, of any ground upon which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the State line. I do not underestimate the great force found in the better marked line of the defendant."

This case was taken on appeal to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, and there decided, Lurton, Justice, delivering the opinion (103 Fed. Rep., 532). In the opinion, speaking of the better marked line on Slick Rock Creek, contended for by the defendants, the Court says (page 539):

Lurton's Opinion

"To support this contention appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodderstack ridges, they show 11 trees marked as State line trees, and from this circumstance they contend this was the line actually marked by the commissioners, and adopted by them as the line, and that the calls for course and the main ridge must yield to the actually marked line. That the commissioners marked the line run by them is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute. The North Carolina Act of 1821 adopting and confirming the surveys of the commission concludes with the words, 'the whole distinctly marked with two chops and a blaze on each fore and aft tree and three chops on each side line tree.'"

The Court then goes on to comment upon the fact that the marked trees on that line seem to be scattered, but we think this Court will find that matter explained by the evidence that during the first few miles a great deal of the timber had been burned over.

On page 541, the Court states that two old marked State line trees were found on the Hangover line and those are identified as a black or red oak and a sourwood, and alludes to the fact that whether they were State line trees marked in 1821 was much controverted, but that the master found that they were State line trees. We think that the evidence in this case will entirely dissipate any idea that they were or could be State line trees.

The Court then says:

> "Giving to the finding of the master the weight properly attachable to it, by the well settled rule in that regard, we are unable to see any solid ground for rejecting his conclusion that these disputed trees are State line trees and marked as such in 1821 by the State Commission. We have then two lines run and marked," etc.

On page 542, the Court assumes that the surveyors tentatively or experimentally marked the line up Slick Rock Creek, but abandoned that, and says:

> "This is the only reasonable explanation consistent with the absence of descriptive words calling for a line running down the Tennessee River and then up Slick Rock Creek."

On page 543, the Court says:

> "The Tennessee Legislature, October 18, 1836, passed an act constituting said land a surveyors district, to be known as the Ocoee District, and directed the Surveyor General of the State to survey said lands and plat them off into ranges, townships and sections. The Surveyor General accordingly did survey and plat said land, and the plat shows that he stopped his survey at Slick Rock Creek and made that the eastern boundary of the Ocoee District."

On page 544, the Court says:

> "The fractional sections in the Ocoee District, bounded on the creek, were granted by Tennessee as fractional sections, though none of the grants called for the creek as the State line."

On page 546, the Court in conclusion says this:

> "The case on the whole is one not free from doubts engendered by the existence of the marked line on Slick Rock Creek and its apparent recognition by the Tennessee Surveyor General as the State line. The result reached by the special master, and confirmed by a most careful and conscientious trial judge, is a result which on the whole is most consonant with the clause in the cession act and the subsequent confirmatory boundary acts. The evidence relied upon to deflect the boundary from the line so plainly described by both acts settling the boundary, is not so conclusive as to require us to reverse the action of the circuit court."

After the discovery of the map of the commissioners of 1821, a petition was filed for leave to file a bill of review, which was granted and the bill was filed, and that map with a good deal of explanatory testimony was put in. It is true that the Court sitting at Knoxville denied the bill of review, and on appeal that denial was sustained by the Circuit Court of Appeals sitting at Cincinnati, by the majority of the Court, solely on the ground that the property having been purchased by an alleged innocent purchaser, relying upon the original decree, it would be inequitable to permit the opening of the decree. The majority said nothing about the facts of the case.

Severens, J., in his strong dissenting opinion, commencing on page 342 of the 191 Fed Rep., at page 345, says:

> "The report and map of the commissioners above mentioned, were put in evidence in the Court below in this proceeding and are now before us. The authenticity of them is not disputed. The map shows the line run by the commissioners in distinct color,

and it shows the line as it was contended to be by the defendants in the original case and is the line running on Fodderstack Ridge and is on the line of the 11 marked trees above mentioned. The appellees contend vigorously that these documents are not conclusive and still insist that the true line runs over by Hangover Rock. But it is, I think, a hopeless contest and my conviction that the map shows the true line is unshaken."

We feel justified in saying that it would be difficult to conceive of a stronger case than that here presented by North Carolina in support of her contentions. When we remember the wildness of the country through which the line runs and the almost total absence of local names when this line was established in 1821, and the wonderful transitions through which the country has gone since that time, a period in which it has passed from a native wilderness, rarely trod, even by the foot of a savage, into an advanced and populous country enjoying all the advantages of modern civilization and progress, it cannot fail to be a matter of surprise that so much has survived of a convincing character to determine exactly where the commissioners of 1821 found that the true line ran, and marked and established it accordingly, and that all this so strongly supports the contention of the complaining State.

The Criticisms by Tennessee of North Carolina's Case.

Under these circumstances we are naturally led to inquire what the State of Tennessee has to offer tending to weaken the force of so much evidence of such a cogent nature. Let us see what she says on this subject through her advocates.

General Reputation.

In reply to the great weight of the North Carolina testimony that the general reputation throughout the country in which this line runs, is in favor of the views submitted by the complainant, Tennessee has to offer only a greatly less weight, in respect of number of witnesses and character of testimony, of evidence of the same general character.

Declarations.

In reply to the disinterested declarations of so many men who were present on the survey of 1821, and had no possible motive for speaking untruthfully on the subject, and were of such standing as to exclude a supposition of deliberate fabrication, and such intelligence and familiarity with the subject, as to preclude all possibility of mistake in making these declarations, the declarations, oral as in the case of Tatham, Roetwister's father, Allen, Graves, Mashburn and Foster, and written as in the case of Davenport and the commissioners themselves on both sides,—declarations made before any dispute whatever had arisen about the matter and in such a manner and under such conditions as showed conclusively that they were not designed to effect any object other than the mere transmission and tradition of the truth; in reply, we say to these numerous repeated and consistent declarations of many unbiased men who participated in the survey by which the line was established, run and marked in 1821, Tennessee has nothing to offer beyond a few vague statements of men no one of whom, so far as appears, was present on that survey, or possessed any means of information in regard to that survey more extensive or accurate than the information had by the general public.

Dominion.

No attempt seems to be made on the part of Tennessee to account for the fact that Tennessee did not pretend for more than half a century to grant any land south of Slick Rock Creek or to otherwise assert any claim whatever to that land, although as early as 1805 she did publicly claim the land which extends clear up to that creek on its northern side. In fact, Tennessee not only claimed land up to Slick Rock Creek and no further; but in 1835 she caused to be made and prepared a map and survey showing what her lands in that vicinity were. This map is known as that of her Ocoee Land District. It is laid off in squares and stops at Slick Rock Creek. When, as several times it happened in making that map and the survey from which it was drawn, a complete square could not be made next to Slick Rock Creek without

crossing that stream, the lot which would otherwise have been a square was left in an incomplete shape, bounded on the south by the creek and having the other sides those of a square in shape. Any pretext that the creek was adopted thus as the southern boundary of the Ocoee Land District because the land is so rough as to deter the surveyor who laid out that district from crossing the creek, is refuted by the simple fact that the land on the northern side of the creek where he did survey is just as rough as the land on the southern side of the Creek where he did not survey. (Record, page 88.)

Marked Line.

The trees so numerous and so unquestionably marked by the commissioners in 1821, as State line trees, speak so strongly in support of the North Carolina contentions that it is not strange that so little is even undertaken to be said in behalf of the Tennessee contentions against their unanswerable testimony.

We have seen that there are eighty of these trees yet standing and plainly showing marks which were put upon them in 1821. Others of them, which have fallen or disappeared, have been pointed out in the testimony of reputable witnesses who had seen them and carefully observed the marks in years gone by when they were yet standing, and recognized those marks as State line marks of the requisite age. All these eighty trees are marked precisely in the way in which the commissioners state in their report that they had marked the trees along the line which they settled; all of them have the external appearance of having been marked as early as 1821, and all of them are exactly similar in the appearance of those marks to the trees yet standing and bearing the State line marks on the undisputed portions of this line which these commissioners marked in 1821. But there is one fact which establishes beyond controversy that these are the trees which mark the line as those commissioners determined it to be.

It is a well known fact in natural history that a tree in its growth increases every year by just one ring formed between the woody growth of the preceding year and its bark. It is also well known that any incision of a sharp instrument into

the wood of that tree will always afterward show at the point where it occurred, by the severed parts, that it was made by such an instrument. These facts enable those familiar with the subject to determine when any such incision was made in a growing tree, even though after a few years the growth of the tree may hide all trace of the incision by covering over the wound completely. The growth of the year next following that in which the cut is made will form one ring over that cut and between it and the bark of the tree. The next year another ring will be formed between this last growth and the bark, and so on, as long as the tree continues to grow. So that in order to ascertain how many years have elapsed since the incision was made, it is only necessary to ascertain how many concentric rings have formed on that tree between the incision and the bark. The rings are, on most trees, easily counted as each year's growth is plainly distinguished from another year's growth.

The method of ascertaining how long it has been since an incision was made into the wood of the tree is called by surveyors "blocking." This process is so familiar to men of that calling that it is resorted to almost daily in ascertaining where old lines have been placed through a forest country. So long as the trees grow, so long is it possible to ascertain, within a year or two, exactly the number of years which have elapsed since the incision was made on the original survey. In order to do this the surveyor selects a tree which he thinks may have been marked as a line tree in that survey and the side of the tree on which he thinks it likely that such a line would have been marked. All trace of the line may have disappeared by the growth of the bark on the inside and the sloughing off of the bark on the outer side. But he cuts out a section from the tree, two or three feet in length perpendicularly, so as to include the part of it where the surveyor, striking from the shoulder, would have placed the axe upon it. This section is taken from the tree to a depth as great as would be represented by the number of years which have passed since the survey that he is inquiring about and oftentimes is made to extend, for certainty, to the center of the tree. This block so taken from the tree is then placed on end, just as it stood in

the tree, and split down through that portion where he would expect to find the marks which had been placed upon the tree horizontally. If the tree has been so marked, when the block is thus split open it will show at some point the incision of the axe or other sharp instrument still in the wood. All that then remains is to count the number of annular formations from that incision outward to the bark, and the number thus ascertained will be the number of years which have passed since the incision was made. It will be thus seen that Nature herself perpetuates, in a manner which cannot be fabricated or simulated, the evidence of the time which has passed since the tree was marked and the age of the mark. As surveyors mark boundaries by striking into the tree, along the line which they run, a certain number of marks differing in different cases, and these marks are always placed near each other, it follows that it can be ascertained whether or not a particular tree is on the line of a particular survey and when, if so, that survey was made.

It is only necessary, therefore, that the incision should have passed through the bark and into the wood in order that its age may be ascertained at any time. Incisions which do not pass through the bark will not remain after the exterior bark has been abraded; and blocking can accomplish nothing with them. They will not be found in the wood. Many times the surveyor is aided after a long period of time in selecting the tree to be blocked by external appearances which show on the bark of the tree the marks, or some marks, which lead him to believe that by blocking he will find in the interior the incision for which he is looking. Sometimes, however, it is difficult to count the rings upon a tree of slow growth and some trees have rings which are not clearly separable. The surveyor is aided in his process of counting by trimming the end of a block so taken out in a slanting direction and dressing it with a plane; he can then place a pencil at the outer edge of the incision and draw it along, up or down the block, keeping between the two rings, to its slanting surface and count more easily when he reaches the slanting part, because by slanting it, the rings being cut through diagonally and not directly are more easily determined and made to seem larger.

It is to be noted too that it depends upon the time of year at which the incision was made whether or not that year is to be included in the count. The ring forms in the spring and summer and if the survey in question was made before it formed, the first ring would be identical with the year of the survey, but if that survey was made in the fall of the year, the first ring would count one year after the survey. The same is to be observed in regard to the time of blocking. If in the spring, the last ring should be included in the count, but if the blocking be in the fall, the last ring would represent the year in which the blocking was made. These facts show the accuracy within a year or two of this system of ascertaining the age of a landmark upon trees, and it has always been recognized by men skilled in woodcraft and surveying as the most indubitable and reliable of all methods of determining lines. This process is not only accepted among men of science, but has always been recognized by the Courts of the land and embodied in the real estate laws of the country. Its chief merit is that it is impossible for the facts thus ascertained to be misleading.

Caraway v. Chaney, 51 N. C., 365.

This method, as we have seen, has been resorted to in this case along the line of the contention made by North Carolina on the disputed territory and seven or eight trees have been blocked when they showed external appearances that indicated a mark such as the commissioners reported that they had placed upon the line which they had run. In every instance the hacks were found in the trees and counted out exactly the number of years from 1821 up to the time when the blocks were taken out in 1911. Thus Nature herself has preserved the evidences that the line contended for by North Carolina was marked by State line marks by somebody in 1821. And since other surveyors do not use the same number and combination of marks as those which the commissioners adopted to indicate the State line in 1821, we are driven to the conclusion that no one else was marking the State line in that vicinity in 1821, and that this line must have been marked by these commissioners. The report of the commissioners of 1821, shows that they marked the side line trees and the fore

and aft, or trees directly in the line, but that they did not indicate any turn in the line by marks placed upon the tree to tell that there was such a turn. This line not only is marked as they reported that they marked the State line, but there is upon it an absence of anything on the trees to indicate a turn in the line. This proves indisputably that this was the line which the commissioners marked, and could not have been marked for any other purpose or any other survey.

If the Tennessee side of this case had questioned the accuracy of the blocking resorted to in these cases, or the correctness of the selection of the trees to be blocked, or the good faith of the surveyors who did the blocking, there were left of the reported trees more than seventy which they could easily have blocked for themselves and tested the accuracy and correctness of the work on the part of the North Carolina surveyors in 1911. But in no single instance did they ever block one of these trees so left for their investigation, or offer anything to show a lack of perfect fairness in the work done by the North Carolina surveyors.

But North Carolina has gone further, and filed in this case sworn statements as to the trees from which each numbered block was taken, and filed the blocks themselves in the testimony in order that the Court may count them for itself and know exactly where the work was done and how truthful are the results testified to. Not only has Tennessee failed to block a single tree in the North Carolina contention among those trees which were left by the North Carolina surveyors standing and untouched, but they have, in cases where a tree contained two sets of marks, as in fore and aft trees, not even blocked those which were left on the tree after the North Carolina surveyors had blocked one side. The only blocking attempted by Tennessee, so far as we know, was on tree No. 30 near the northern bank of the Tennessee River, in the half mile distance between the point at which the line approached the river on that side and the point at which it crossed to the mouth of Slick Rock Creek. This tree No. 30 they did block on one side and found marks that dated back to 1854, but the North Carolina surveyors then re-blocked this tree on the opposite side and found not only the marks dated back to

1854, but a full set of State line marks deeper in that went back to 1821. This block is in evidence in this case and the Court is invited to inspect it and count its rings for itself. In the face of this most cogent, extensive and clear proof of North Carolina's contention we naturally inquire what Tennessee found in the nature of marks upon the trees along the line for which she is contending in the disputed territory. Although there are miles of that line passing through virgin forests, not one single tree has been found that could be subjected to this infallible test. In fact there is no trace that a single State line tree can be found in all Tennessee's contention around the head of Tellico River and only two trees are claimed to be marked with the State line marks in the line of the Tennessee contention over Hangover. Of these two trees it can only be said that the existence of State line marks upon either is seriously controverted. Neither stood on the southern bank of the river where such a tree might have been expected to be marked if that was the true line, or for several miles beyond. Both were so decayed on the interior that it was impossible to apply the test of blocking, since the wood which would have contained any incision made in 1821 had rotted away and external appearances are not reliable in testing the age of a mark on a tree when so great a period as half a century or more is in question. One of these trees does not bear the requisite number of marks; the other is at an old Indian cabin place and has innumerable hacks on all sides of it.

The opinion of the North Carolina surveyors after a careful inspection of these trees was that neither was a State line tree and Mr. Gannett, the Government expert, was equally positive in the same view.

Driven by these powerful facts, the representatives of Tennessee almost, if not actually, admit that in both instances the commissioners did in 1821 mark the trees along the lines contended for by North Carolina. But they fall back upon the theory that although these commissioners did mark these lines in 1821, they abandoned them for other lines which they did not mark, or for other lines evidenced by no traces of marks made by them upon the trees which yet re-

main. It would be strange indeed if, while along miles of undisputed line marked by those commissioners in 1821 there yet remain numerous trees which show the marks that they put upon them, there was not to be found a single mark placed by them upon any of the trees within the miles of space covered by other portions of their line. But this would be the case if the line ran along the course claimed by Tennessee to have been run and marked by these commissioners at the same time. Why the commissioners in 1821 should distinctly, carefully and laboriously mark mile after mile of line and then abandon it and adopt a line which they did not mark, and then report a line which they did not adopt and report that they marked a line which they did adopt, is inconceivable.

They state in their report to both Legislatures that they marked the lines which they made, and how they marked them. These marks they knew were to guide coming generations in determining where they had placed the line. If then they left miles of marked trees with their peculiar marks when they did not mean the line to go there, they were guilty of gross delinquency and incomprehensible misconduct. And if, to further confuse the matter, they reported they had marked the line, but really in truth had not marked it for miles of its extent, their conduct was criminal in the extreme. If such a state of facts existed, it is certain that some of the numerous parties on the survey would have found out these things and that more than half a century would not have been allowed to pass without some rectification. We can only conclude that the commissioners did what they said they did—marked the line which they adopted and marked no other line than that; and we must assume that the Legislatures when they accepted the marked line, did not accept a different line which was not marked and which was not reported to them and of which they could have had no knowledge whatever.

Map of 1821.

The commissioners of 1821, submitted to each legislature, with their written report of what they had done and as part of that report, a map showing the line which they had run.

marked and settled between the two States. The adoption by the two legislatures of their report included, of course, this map. The North Carolina copy of this map has been lost or destroyed. For many years the Tennessee copy had disappeared and was believed to be no longer in existence. It was found, however, shortly before the beginning of this suit in the basement of the Capital at Nashville. This map is in evidence in this case. Several copies of it have been obtained and introduced in the testimony. All of them, however, except a rather dim photographic copy, seem to be inaccurate in some particulars. Because of this, the State of Tennessee has been notified to produce, on the trial of this case, that original map and has promised to do so. (Record, pages 1086, 1081.) That map strongly supports the North Carolina contentions and as strongly antagonizes those of Tennessee. With the latter it is wholly irreconcilable.

The courses and distances shown on that map are substantially the courses and distances claimed by North Carolina, while the general shape of the line and the natural objects exhibited by it exactly coincide with North Carolina's claim as both regions of dispute. Thus after crossing the Tennessee River the line, as shown by this map, runs toward for some distance in a course nearly at right angles to the river, when it makes a decided bend toward the left or south and so continues until it reaches the undisputed territory at the point now called Junction. This is precisely what it must do if the North Carolina contention is correct. But it is precisely what it must not do if the Tennessee contention is correct. According to the latter that line, after crossing the Tennessee River, should run forward, not at approximately a right angle to the river, but at an acute angle with the river, in a southwestwardly course for some distance, when it should make an equally decided bend toward the right or north and so continue until it reaches the undisputed territory at the point now called Junction. Thus, according to the North Carolina contention, the line between the Tennessee and Junction should form an elbow opening or curving toward the south, while according to the Tennessee contention it should form an elbow opening or curving toward the north.

The map of 1821 shows here an elbow opening or curving toward the south and agreeing in shape with the claim of North Carolina but differing in shape from the claim of Tennessee.

Again, according to the North Carolina contention, the line when it crosses the Tennessee River should be at the mouth of a large creek up which it passes for miles as it goes forward; while according to the Tennessee contention it should reach the southern bank of the river on a bluff half a mile distant from any stream and pass on up a ridge and over gaps and peaks without coming to any water course before it reaches Junction. The map of 1821 shows that when the line reaches the southern bank of the Tennessee River it is at the mouth of a large creek up which it then passes for several miles.

Tennessee's advocates, of course, find it hard to escape the result of the wound thus inflicted upon their claims by an arrow from her own quiver. They can only say that the map contains some inaccuracies. Certainly this could not do away with the value of this document in its main features. The courses and distances and general direction of the line which it shows are undoubtedly correct except in one or two very small particulars, such as are likely to occur in the notes from which every plat must be made and are on inspection slips in the work which show their inaccuracy on their face and are easily corrected. Thus the commissioners obviously did not note every minute turn in the crest of the ridge along which, at any time, they were running. To have done so would have required something more than a year probably of time and an enormous amount of labor and expense. Their entire work did not exceed forty-five days.

In running along the crest of a ridge they would take the direction of some object at a considerable distance in advance and call for that as the next course in their line. Between the two points there would be many small turns in the crest of the ridge which this course so given would not show. The measurement of distance, however, they made along the crest of the ridge. This appears throughout the entire map and accounts for the fact that from the 64th mile tree the course laid down on the map is directly to the mouth of

Slick Rock Creek; whereas the measurements taken between those points could not, by reason of the roughness of the surface, be made in the direct line, but were made down a small ridge to about the bank of the river, and thence down the river for about half a mile and thence across the river to the mouth of Slick Rock Creek. The marking of the trees, of course, was made where the measurements were actually taken and not in accordance with the straight line indicated by the compass, which in such cases they did not minutely follow. This course is necessary always in the meandering of a stream or mountain ridge where the windings are numerous and the variations often small. But it does not, by any means, point to an inaccuracy of any moment in a survey so made.

Again, it is true that in making this map it appears the draftsman first marked his lines according to course and distance upon the paper and then platted in the Creek up which they ran, and that in the case of Slick Rock Creek he inadvertently made that Creek coincident with the line for a shorter distance than was actually correct, and this led necessarily to a sketching in of the mountain incorrectly at the point where the creek and line appeared on the map to separate. This can scarcely be said to militate against the force of the map as a piece of evidence. It does show that the line was at the creek, at the mouth of the latter, and ran for several miles up the creek in certain courses and distances. No stream in that part of the world exactly coincides with this line even for the distance shown on the map, except Slick Rock Creek, and Slick Rock Creek exactly coincides with the map for the several miles of distance. In fact, no other stream in that vicinity, or within many miles thereof, would have a single course or distance that would coincide with any on that map except Slick Rock Creek. The stream laid down on the map as a "large creek" could not possibly be the Cheowah River because, first, the mouth of Cheowah River is not in the direction shown by the map from the 64th mile tree, and secondly, the course of the Cheowah River is at no point the same as the course of the creek so laid down, and if at any point of the creek so laid down you should take the next course and apply that to any

point on the Cheowah River, you would be leaving the stream in the next call instead of following it; whereas in the case of Slick Rock Creek the stream fits the line. The testimony seems to show that Cheowah River was then known by that name, for the old Indian Ropetwister declares that he had always known it by that name from his earliest recollection. Then it is more than probable that Slick Rock Creek had no name prior to 1821, and derived its name at that time from the difficulty which the commissioners experienced in so frequently crossing back and forth as they ran up it in making this line, probably finding the stones on which they stepped to be slippery. It does appear in the evidence that it was on that occasion that the commissioners bestowed upon the peak, to which they ran upon leaving the creek, the name which it now bears, of Big Fodder Stack. Until some other stream can be discovered up which the line, like that upon the plat, can be made to run, it must appear conclusively that the stream there laid down on the map is Slick Rock Creek, even though the draftsman of that map, by some inadvertence, did not make the creek and line coincide for quite the correct distance, while he did so for several miles.

In this connection let it be constantly borne in mind that up this Slick Rock Creek there runs a line of marked trees exactly coinciding with the line upon the map and placed and hacked as such a line in 1821, with the peculiar combination of marks adopted by the commissioners in running the State line. There is not another stream anywhere on the face of the earth that shows such a line of trees. But wherever that stream is that the commissioners passed up, it must show these trees. The conclusion is irresistible that this is the stream.

It is a remarkable and very significant fact that every surveyor who has sought for that line since 1821, including J. W. C. Percy, the surveyor of Cherokee County in 1852-53, H. S. Hayes, J. C. Bogle, H. P. Hyde, M. G. Phillips, F. M. Lovingood, C. L. Slagle, and R. W. Collett, in the subsequent years and all subsequent investigation, acting independently of each other, have all adopted that line as the true boundary point between the States. The only exception to this re-

markable unanimity of conduct and conclusions is that of W. D. Hale, the defendant's chief witness on the question of location; and with respect to him, it will be noted by the Court that he formed an opinion as to where he believed the true line to be, to wit, over the Hangover range, because in his judgment that was the main ridge about the year 1888, long before the discovery of the map of the commissioners and before the finding of the Davenport field notes; and he has tenaciously held on to this theory of his, notwithstanding the flood of light that has been thrown on the matter by that map, those notes and subsequent most accurate and scientific surveys and the evidence developed by them.

When we come to the Tellico section of this controversy, this map of 1821, shows lines which necessarily from their shape, course and distance, run down State Ridge, crossing Tellico River and up Jenks Knob. It would not be possible to make the line, laid down on this map, take the shape at this point of the Tennessee contention, which in running around the head of Tellico River makes almost a semicircle where this map shows a straight line. The North Carolina contention is for the straight line and is plainly and fully supported by that laid down on the map of 1821. Then, too, let us here recall the fact that along this State Line Ridge the trees marked for a State line in 1821 are still to be seen and still bear those marks, while beyond the crossing of the Tellico river on this line we find the famous old holly still standing and bearing the inscription "86 to," put upon it by these commissioners in 1821. At this point attention is directed to the case of *Stevenson v. Ford*, 116 Fed., 147.

If there is a reply attempted to this portion of the map of 1821, on the part of Tennessee, it has escaped us. It is rare that evidence of so important a character and of such decided force as the map of 1821, when made to represent a line run through so wild and uninhabited a region and after so long a time, cannot be attacked with more success and will not be found to contain more inaccuracies and discrepancies than this one. Every leading feature of the map stands without successful adverse criticism and coincident with the claims of the State of North Carolina.

Davenport Field Notes.

When this suit was begun and even up to the time when the greater part of the testimony in it had been taken, a vigorous search had been made by both sides to find the field notes of William Davenport, the surveyor on the part of North Carolina, in running the line in 1821, and this search had been entirely without results. The importance of these notes had been seen from the beginning. At last they were found. In William Davenport's old desk, in a drawer which had been rarely, if ever, examined from the time of his death in 1859, was discovered the book, partly in his own handwriting, which contained these notes in full and which was stated to so contain them on the back of the book itself by inscription made by him. When he died no controversy had ever arisen in regard to these sections of the State boundary. It is certain that he made field notes upon the survey. It is equally certain that he had no motive for misrepresentation and that allowances being made for human fallibility, these statements in his notes would represent the true line. A careful examination of them, made by surveyors upon the ground, shows that they are entirely in accord in every respect with the North Carolina contention in both sections of dispute and that they refute, with the clearest possible refutation, every contention of the State of Tennessee. It is not questioned even that they have this effect.

They declare that the line crosses the Tennessee River at a large white pine on the south side of that river at the mouth of a large creek, the 65th mile, and that it runs up that creek first on one side and then on the other for a distance of five miles, when it turns and passes up a peak which can only be that now called Big Fodderstack, and thence passed along to the point now called Junction; and that, after reaching "County Corners" it passed along the crest of what is now called the State Line Ridge until it came to a holly tree at the 86th mile, near the head of the Middle Fork of Tellico River, and thence on to the main mountain.

It is insisted on the part of the State of Tennessee that if you run the calls given in the Davenport field notes, by taking course and distance and discarding natural objects

called for, you will not follow the true line. It is out of this fact that the well recognized doctrine of law has been established, that where course and distance conflict with natural objects, the former must be discarded and the latter adopted. Tennessee's surveyor, Williams, admits this and says that it is not a fair test of an old line to attempt to run it by course and distance without regard to the natural objects called for, and that these notes of Davenport disclose a familiarity with the true line in the uncontroverted portions of the boundary. The desperation of this Tennessee contention as strongly demonstrated by the admissions on cross-examination of this witness, who was one of the surveyors who made this pretended test and admits that it could not be a true test. "But," say the advocates of Tennessee, "the Davenport field notes are not competent evidence in this case." One of their grounds for objection is that they are not entirely in his handwriting. But they do appear to have been made, in that part which is not his own handwriting, by his wife who often did writing for him, and they do appear to have been corrected in his own handwriting, and they are endorsed upon the back in his own handwriting as the notes for the survey of the State line in 1821, while large portions of them are actually written by himself. Surely there can be no doubt that this book of notes is the work of William Davenport.

It is still insisted on the part of Tennessee that the notes would be incompetent even if made by William Davenport himself. They would be competent, however, upon several grounds: Competent as part of the *res gestae;* competent as a copy of duplicate of the lost set of field notes filed with the report of the commissioners; competent as the declaration of a deceased and disinterested witness, made years before the controversy arose, a witness who had the most accurate possible information of the subject on which he was writing. That such notes are competent under these circumstances is expressly held in *Dupper v. McKesson*, 100 N. C., 1, 9.

It is submitted thus that the objections on the part of the State of Tennessee to the case made out by the State of North

Carolina have not weakened the force of that case and that it is as powerful after those objections have been examined as before they were made.

Having thus seen and examined the North Carolina contentions and the evidence in support thereof, and discussed the objections made to that evidence on the part of Tennessee, let us see what the State of Tennessee has to support its contentions.

Contentions of Tennessee.

This is a case in which it would seem to be the duty of each side to take a positive position. It is not enough for Tennessee to find fault with the case made out by the State of North Carolina as to where the boundary line was, but in this suit it is her duty to show where she claims that line to be, because this action must determine where the true line is and not merely determine the force of the contention of either side. Apparently Tennessee has not so apprehended the matter, however, because her contention in regard to the State line in the Slick Rock neighborhood has not always been, if we may judge from the testimony offered by her, entirely consistent. At one time her testimony seems to be an effort to show that when the line passing from the 64th mile tree approached the Tennessee River, it passed on in a straight line and crossed that river and thence ran up the ridge so as to pass over Hangover and on to Junction. But when the map of 1821 was discovered she seems, because it showed that the river was crossed at the mouth of a large creek on the south bank, to have endeavored to show that the crossing was at the mouth of Cheowah River some distance up the Tennessee River; and toward the end of the testimony, when the Davenport field notes had been brought into the case, the testimony of Tennessee seems to be an effort to show that the State line ran from the 64th mile tree as marked, down to near the river bank and down the river to a point opposite the mouth of Slick Rock Creek and thence across the stream to the mouth of that creek, and thence up the river so as to pass up the ridge and over Hangover to Junction.

The cession act does declare that the line in question should run "along the extreme height of the said mountain," referring to "the Great Iron or Smoky Mountain." The Legislature of North Carolina which passed this "Cession Act" and the Congress of the United States which accepted under that act the territory ceded, in the description of the eastern boundary of that territory by it, must have known full well that, although no water course is called for after leaving "the Painted Rock on French Broad River" and it is not even said that the French Broad River is to be crossed, still this boundary line would cross the Tennessee River, as well as the Pigeon River, Hiwassee River and a fork of Tellico River. It would be impossible for this boundary to be laid out without crossing all these streams or to be laid out with distant approximation without crossing French Broad, Pigeon, Tennessee and Hiawassee rivers. Of course, they knew too that this boundary could not cross the Tennessee River on "the extreme height" of a mountain. These directions for the boundary line to run "along the extreme height of the said mountain" were, of course, general directions, and it was not understood or expected that the boundary line would be, at every point, on the extreme height of a mountain. No more could it have been understood or expected that this line in passing from the height of the mountain to one of these rivers or in passing up from one of these rivers, after crossing it, to the extreme height of the mountain again, would or could be on the extreme height of the mountain.

It is plain, therefore, that these directions to run the boundary line "along the extreme height of the said mountain" could have no application in running that line when it was descending to one of these rivers or was crossing one of these rivers or was ascending from one of these rivers. This language, then, relied on by Tennessee has nothing to do, and can have nothing to do, with the parts of the line to which she seeks to apply it. The full observance of the directions contained in that language is had when the line while on the mountains is made to run along the extreme height, and it is only to such portions of the line that this

language has any application whatever. It is impossible to call any of the ridges, which put down to one of these rivers on either side, the extreme height of said mountain without doing violence to the terms employed.

The phrase with which we have to do in this case is "along the extreme height of the said mountain." As it could not describe the crossing of the Tennessee River, so it could not describe the descent to that river nor the ascent from it. Two or more ridges put down to it on either side. The highest of these, if it were possible to determine which was highest, would not be "the extreme height of the said (Great Iron or Smoky) mountain." But it is not said that the highest of the prongs or branches or branch ridges should be followed. If it were so declared it would be difficult and even impossible to determine which one was meant. One of them will be higher than another at one place and lower than that other at another place. No better illustration of this could be found than in this very case of the Fodderstack and Hangover ridges. The Hangover Ridge has higher peaks than the Fodderstack Ridge; but it has also deeper gaps than the Fodderstack Ridge. On the other hand, the Fodderstack Ridge has a much greater continuity of high ridge than the Hangover Ridge and approaches more nearly to the Tennessee River. If the highest peak must be gone over, an undisputed part of the State line in that neighborhood must be changed so as to run over Huckleberry Knob, which is not on the State line, but is the highest peak in that part of the country.

If we have misapprehended the purpose of the testimony produced by her, it is because that purpose seemed to be indicated by the nature of the testimony so introduced at the different periods referred to. But, assuming that her contention is that set forth in her Answer, that the State line crossed the river at the point where it approached its northern bank and then passed over the Hangover Ridge to Junction, we have seen that she has been unable to support this contention by any great weight of evidence to show the general reputation, by no evidence of the declarations of deceased persons present upon the survey of 1821, by no clear

evidence of claim prior to the latter part of the 19th century, by no marked line, by no plat filed by the commissioners or other document made by them, and by the field notes of no surveyor who was there in 1821.

In fact, the Tennessee contention seems to be based entirely upon her claim that the Cession Act calls for "running with the extreme height of a mountain" and that the ridge over Hangover is the "extreme height of a mountain" at that place and the way around the head of Tellico is the "extreme height" of the mountain at that place.

In the Tellico country the extreme height of the mountain has been followed in the contention of North Carolina; and the evidence of the Davenport field notes, the map of 1821, and the marked trees, except at and immediately adjoining the crossing of the fork of Tellico River fully support that contention as to that part of the State boundary. In fact the ridge along which the line as marked runs here has been known, from that fact apparently ever since 1821, as the "State Line Ridge" or "State Ridge." Yet Tennessee would have this line rejected and one adopted instead on which there is not and, so far as appears, never has been a state line marked tree and which no map or field notes supports, merely because through there are irregularly placed at uneven distances a number of peaks arising from a level or approximately level country and because to go around that way would put into Tennessee all the head streams of the Tellico River.

The commissioners of 1821, plainly followed the calls of the Cession Act and their line was at once accepted and adopted by both states without question or hesitation.

The Court will note that the controlling proposition in the case by the defendant is that the act of cession defined and located the line through this wilderness region as the "extreme height" (of the great Iron or Smoky Mountain) "to where it strikes the Tennessee River * * * then along the extreme height of the same to the place where it is called Unicoi or Unaka Mountain; and that the "Hangover Lead" to the southwest of the Tennessee River to the point marked on the map Junction is the extreme height of the said mountain.

As a matter of fact, although we don't regard that, in view of the subsequent surveys, location and marking of the line by the commissioners under the act of 1821, as important, the Hangover lead is not any more than the Big Fodderstack lead, the "extreme height" of the mountain. The evidence shows that the Big Fodderstack Ridge or lead rises rapidly from the river and soon assumes the proportions of a very bold ridge or mountain, with several sharp elevated peaks on it, and that the Hangover lead does not begin its elevation until some three or four miles southwest of the river and the territory between the foot of that elevation and the river is very much more depressed and flattened and in face has no mountainous character. It is true that one or two peaks of the Hangover Ridge, after it has assumed its elevated character, are of greater elevation than the highest peaks of the Big Fodderstack Ridge or lead; and it is apparent from the evidence that the continuity or solidarity of the Hangover Ridge is not equal to that of the Big Fodderstack lead. This unquestionably must have been obvious to the commissioners when they looked across the Tennessee River from the northeastern side with a view to selecting which one of these ridges would take them most consistently with the general course they were running to the top at Junction, where the mountain resumes its general features and characteristics of the great leading range. And it is in evidence, especially in the testimony of Mr. Gannett and Mr. Burns, that, looking from the point on the northeastern side of the river, the Big Fodderstack range and Big Fodder Stack Mountain were in almost exact line with the general course by which they had run the line theretofore, and which they subsequently followed. And the Court will at once see the impossibility of the commissioners making that sort of measurement and calculation under the circumstances which surrounded them to determine exactly which was the highest of these two ridges.

But whatever may be the truth as to which is the highest and most prominent of these ridges, the commissioners by the overwhelming evidence in this case determined upon the Big Fodderstack Ridge, and in order to reach it most directly and to preserve the consistency of the line and course which

they had theretofore run, determined to approach it by following the "Large Creek" now known as Slick Rock Creek, to a point from where Big Fodderstack could be most easily ascended and the line thus continued. That the commissioners were clothed with the authority to make this selection and that the two states subsequently, in the most solemn manner, ratified it and approved his action there is no doubt.

When the line approached Tennessee River there were three or more prongs of the mountain running down to that stream and three or more running up from the stream after it was crossed. The call did not demand the highest of these prongs for the state line. Had it done so, it would have been difficult, in the extreme, to determine which of them was the highest or what would constitute one higher than another, whether high peaks and deep gaps, as in the Tennessee contention, or continuity of high ridge. Probably, if such had been the call, it would have been necessary for the commissioners on leaving "the extreme height of the said mountain" on the northern side of the river to have turned to the left or west and run down a prong more western than that which they followed and after crossing the river to have run up on the other side the Fodderstack Ridge from where it strikes the river for its full length, passing over Little Fodderstack, as well as Big Fodderstack and putting in North Carolina a large area of country which is by her contention conceded to Tennessee.

But the call was not for the highest of these mountain prongs and the commissioners did what, under the circumstances, it would seem no one could reasonably complain of. They followed the middle prong down to the river as the most direct and went up Slick Rock Creek and a ridge putting up to Big Fodderstack until they came to that peak, thus leaving Little Fodderstack in Tennessee and dividing the territory between the outer of these prongs about equally between the two States. The commissioners for both states perceived the fairness of this course and the Legislatures of both states were satisfied with its justness and correctness and adopted it.

If there were nothing in the case besides the calls of the

Cession Act, North Carolina might well insist that her contention was the fair, correct and proper one. But when it is established, it would seem beyond reasonable dispute, by the line of marked trees, the plat of 1821, and the Davenport field notes and other circumstances and facts in the case, that her contention is for the line "accurately run, distinctly marked, and permanently established" by the commissioners of 1821, and accepted as correct by the solemn legislative enactment of both States at once, it appears that controversy on the subject should end.

The final insistence of Tennessee is that, even conceding that the line claimed by North Carolina was the one actually run, marked and established by the commissioners of 1821, and promptly accepted and solemnly adopted by both states, still, because by the Constitution of the United States, "no State shall, without the consent of Congress . . . enter into any agreement or compact with another State," this location of the boundary line would be invalid as being an agreement or compact entered into between the two states "without the consent of Congress."

We think that it has been sufficiently shown already that the line claimed by North Carolina is the true line under the Cession Act and consequently the line which has the express sanction of the Congress of the United States. But aside from this, the contention of Tennessee last mentioned is a misapprehension of the scope and meaning of the clause of the Constitution of the United States which it invokes.

> "Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant; and the line so established takes effect, *not as an alienation of territory, but as a definition of the true and ancient boundary.*"
>
> Virginia v. Tennessee, 148 U. S., 522.
> Indiana v. Kentucky, 136 U. S., 479, 510.
> Louisiana v. Mississippi, 202 U. S., 1, 53.

It would be indeed a new doctrine that all state boundaries are unsettled to the determination of which in a certain way an express consent of Congress has not been obtained and must forever remain unsettled until that consent is expressly given for each line of every boundary.

We submit, with confidence born of the facts in the case, that we have indubitably established our title to this territory by the traditions of the country, by the declarations of good men made years before any controversy arose, by the acts of sovereign dominion exercised by the two states, by the marks which the surveyors cut into the trees that their work might not perish, by the map which the commissioners filed as a photograph of their labors, and by every call and course and distance entered by the surveyors who ran the line.

Respectfully submitted,

THOMAS W. BICKETT,
Attorney General of North Carolina.

THEO. F. DAVIDSON,
F. A. SONDLEY,
C. B. MATTHEWS,
Of Counsel.

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No. 4—Original

STATE OF NORTH CAROLINA
Complainant

vs.

STATE OF TENNESSEE
Defendant

In Equity

REPLY BRIEF FOR THE STATE OF NORTH CAROLINA COMPLAINANT

THOMAS W. BICKETT,
Attorney General of North Caralina

THEO. F. DAVIDSON,
F. A. DUDLEY,
C. B. MATTHEWS,
Of Counsel

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REPLY BRIEF IN BEHALF OF THE STATE OF NORTH CAROLINA

STATEMENT.

Certain statements contained in the original Brief filed in this cause in behalf of the State of Tennessee, and in the Brief filed by Mr. John Franklin Shields and Mr. William A. Stone, counsel for the Babcock Lumber & Land Company as *amici curiae*, and in the Reply Brief on behalf of the State of Tennessee, all filed in this cause since the brief in behalf of the State of North Carolina was filed herein, make it desirable on the part of the State of North Carolina to correct what we deem numerous misapprehensions of the testimony in those briefs and to present what

we believe to be the correct statement of various positions, both of fact and of law, relating to the matters discussed in those Briefs and not heretofore presented in behalf of the State of North Carolina as thoroughly as the facts now seem to demand.

In the outset the State of North Carolina desires to state with much emphasis that she cannot understand many portions of the testimony referred to in those briefs as they seem to be understood on the part of the counsel for the State of Tennessee. But most especially does the State of North Carolina desire to enter her respectful protest against indiscriminate assaults made upon the good faith of almost every material witness introduced in her behalf, which find no support in the testimony and seem to be but little calculated to aid in the decision of the cause, and comport but little with its dignity, character and magnitude.

At the beginning of this cause the State of North Carolina felt that it involved for its proper decision an investigation by a trained expert wholly indifferent to the interests of the parties and knowing nothing of their particular views. Impelled by this motive, which seemed to her to be free from reasonable criticism, she applied to the Department of the United States Government most familiar with such matters and having them to deal with most frequently, to send her an expert such as that Department might be able to recommend for this character of work. The head of the Department applied to selected for this work a gentleman whose abilities, skill, learning and experience peculiarly qualified him to ascertain the truth; and, in com-

pliance with North Carolina's request, he went upon the ground, made his investigations according to his own judgment, and went upon the stand and testified to the results of his investigation, giving to each party to the cause a full opportunity to examine him at such length as might be deemed best in regard to all the matters on which he has given testimony. Each party availed itself of the opportunity thus presented to the fullest extent that it desired. The qualifications of this witness; his experience in such matters; his character as an impartial and truthworthy man, and the circumstances under which he was appointed to the work will be found set out in the record.

Record, pp. 409-411.

The results of his work are before the Court and we confidently assert that there is nothing in it to justify the grave imputations and serious accusations made against him and his work and his motives in the briefs filed in behalf of the contention of the State of Tennessee.

It would be tedious to call attention to all the charges, insinuations, sneers and imputations of which this gentleman is made the subject in the briefs mentioned. A few references will sufficiently show their character. Thus on page 87 of the Original Brief filed in behalf of the State of Tennessee it is stated that "Burns and Gannett went to the work of their employers not for the purpose of making surveys and adducing reasonable and logical conclusions therefrom, but for the purpose of making argument to sustain a line previously settled on." Again, on page 96 of the

same Brief it is said, "But Mr. Gannett in his answer above quoted did not disclose the whole truth, if indeed his statement be true at all"; and again on the same page, "it was regrettable but necessary to give proper coloring to the weight and credibility of Mr. Gannet's testimony to remove this high Government official from his assumed pedestal of impartiality and reduce him to the position of an ordinary hired expert." Yet again on page 97 of the Original Brief, "that he was intending to aid his employer and, to put it mildly, was somewhat careless with the truth, is disclosed by the following testimony, etc." And there are many places where his statements are spoken of as forced concessions and admissions reluctantly made by him. These references will serve to show the harshness with which this gentleman was treated, apparently for no other reason than that he found certain things in his examination and told them with candor in his testimony, and they were disagreeable facts to those who represented the State of Tennessee.

Nor were other witnesses of high character and capability treated in those briefs with more consideration. It almost seemed that no accusation bearing upon their motives and veracity was omitted when it suggested itself to learned counsel for the State of Tennessee as calculated to diminish the force of the facts testified to by these witnesses which tended to support the contentions of the State of North Carolina.

Other persons were assailed with equal violence because they claimed under the State of North Carolina portions of the land embraced in the controverted boundaries men-

tioned in this cause, and even that State herself was reproached in no uncertain terms, as guilty of unworthy conduct in regard to this litigation.

Record, pp. 31-32.

The foundation for this last imputation seems to be no greater than that when the suit was begun there was no appropriation to pay its expenses and the Governor required an indemnity bond to be given to the State in consequence; but at the next session of the Legislature of North Carolina a joint resolution was adopted by that body referring to this pending suit and directing the Governor, "to employ all the powers and agencies of the State in the further prosecution of the said suit and to draw his warrant upon the Treasurer of the State for such necessary expense as may be incurred on behalf of the State therein,"

Record, pp. 718-719;

and in the further fact that persons claiming under the State of North Carolina portions of the land involved voluntarily contributed their aid in endeavoring to procure a proper presentation to this Court of the matters now pending before it.

We refer to this matter only to say that harsh terms, injurious suspicion, and denunciatory epithets seem to us to be entirely useless in aiding the Court, and to be wholly uncalled for by anything contained in any part of the testimony filed in the cause.

DECLARATIONS OF DECEASED PERSONS.

In most of the States of the American Union is it ad-

missible to introduce in evidence upon the question of private boundaries the declarations of deceased persons made *ante litem mortem*, when they were disinterested.

Clement v. Packer, 125 U. S., 309, 321.
Ayres v. Watson, 137 U. S., 596.
Hunnicutt v. Peyton, 102 U. S., 333.
Dobson v. Finley, 53 N. C., 495, 499.
Scoggins v. Dalrymple, 52 N. C., 46.
Dugger v. McKesson, 100 N. C., 1, 9-10.
Westfelt v. Adams, 131 N. C., 379.
Whitehurst v. Pettifer, 87 N. C., 179.
Mendenhall v. Cassells, 20 N. C., 43, 45.
Beards' Lessee v. Talbott, 1 Cooks (Tenn.) Rep., 142.

But whatever might be the rule in relation to private boundaries in any particular jurisdiction it has always been the rule in them all that such testimony was admissible in order to establish public boundaries.

Plaxton v. Dare, 10 Barnw. and Cressw., 17.
Newcastle v. Broxtowe, 4 Barnw. and Adolph, 273.
Weeks v. Sparke, 1 Maule and Selwyn, 686, 687.
Dobson v. Finley, 53 N. C., 495.
1 Greenl. Ev., Sec. 128.

(a) THE DAVENPORT FIELD NOTES.

There is in behalf of the North Carolina contention a remarkable amount of this class of testimony, tending to support those contentions throughout, while in behalf of those contentions made by Tennessee the testimony seems

weak and inconclusive. Chief among these pieces of evidence which support the views urged by North Carolina are the field notes of one of the surveyors who ran and marked the line in 1821, and introduced in evidence in this case and called the "Davenport Field Notes."

It is said in one of the briefs filed in behalf of the Tennessee contentions that while the field notes of the survey made in the latter part of the eighteenth century under the supervision of Vance, Matthews and McDowell as Commissioners on the part of North Carolina, and other Commissioners on the part of Tennessee, were filed with the report of the Commissioners in the archives of North Carolina, no such field notes of the survey of 1821 were so filed. This is a misapprehension. In the Acts providing for both of these surveys the Commissioners on the part of North Carolina were directed, after running and marking the line, to "cause an accurate plat or plan of the said boundary line to be made, specifying the portions, distances and natural and artificial marks, and return the same to the next General Assembly to be preserved among the archives of the State."

2 Rev. Stat. of N. C., 94, 95.

The presumption must be that as it was the duty of these Commissioners to file some statement of the courses, distances and natural and artificial marks, that they regarded that duty in both instances and did file such a document. This would be nothing more or less than the field notes of the survey. For this reason the Supreme Court of North

Carolina ruled that the field notes of the Vance, Matthews and McDowell survey would be taken to have been filed.

Dugger v. McKesson, 100 N. C., 1, 9.

But in 1831 the capitol of North Carolina was burned and many of her records destroyed, and since that time it has been impossible to find the field notes of either of these surveys as filed in her archives. Copies then were unquestionably competent.

Nor are these field notes of the survey all of the traditional evidence which support most strongly the views upheld by the State of North Carolina in regard to this matter.

(b) THE SLICK ROCK TRADITION.

More than a score of witnesses, many of them citizens of Tennessee, testified that they had always understood that the State Line went up Slick Rock Creek to Big Fodderstack Lead. (Record, pp. 155-164; 863-899.) From the testimony of these witnesses, it appears that this information came from not less than seven men who had been present when the Commissioners ran and marked the line viz.: Thomas C. Tatham, Levi Mashburn, David Taylor, William Graves, William Allen, Thomas Calloway and one Foster. In addition to the evidence of the statements of these seven men who had been in the survey, there was evidence of statements by many other old men who were believed to have special means of knowledge dating back to the time when the line was run. Among the latter were the Tennesseans William Williams, Sr., Joseph Milligan, Har-

vey Bright, John Bright, Mike Harrison, William Harrison, Jack Miligan, Jason Culberson, John Harrison, Rev. Robert Ballew and Col. Milligan, and there was also the Indian, the father of Consene, known as Ropetwister, whose statements to his son regarding the line indicated that he was present when the line was surveyed up Slick Rock Creek and along Fodderstack Ridge (p. 175). Ropetwister, himself, was old enough at the time of the removal of the Cherokee from that section, in 1836, to be a star ball player (p. 167) and to carry a pack as far as the Mississippi River (p. 174).

Opposed to this mass of testimony, is the testimony of witnesses none of whom claims to have received his information from a person present at the running of the line. Most of the persons cited as authority for the statement that the line ran up Hangover appear to have stated, or testified, or acted, upon the belief that it ran up Slick Rock Creek. Thus, James L. Nelson testified that Col. W. H. Thomas and Andy Colbert (Colvard) told him that the line was on Hangover Ridge, while it is in evidence that these two men held grants from North Carolina for most of the Slick Rock Basin, which grants called for Slick Rock Creek as the State Line (91-93; 897-98). His testimony is also flatly contradicted by William Williams, who was employed by Col. Thomas to improve and hold some land on Slick Rock Creek with a view to getting a grant from North Carolina for it (939-40). Pleasant Henry testified that David Orr told him the line ran up Hangover, while David Orr himself testified that he had always understood that

the Fodderstack Lead was the State Line (865-6). Pleasant Henry, and his father-in-law Boyd McMurray, also testified that Jack Milligan said the line went up Hangover, but four reputable disinterested men (V. E. Grant, p. 190; E. W. Harrison, p. 196; R. B. Washburn, p. 887, and W. P. Chambers, p. 558) each testified positively that this same Jack Milligan told him that the line ran up Slick Rock. Witness Chambers' testimony on that point indicates that Jack Milligan's opinion that "the line runs up Slick Rock and you can't move it" was most forcibly expressed to Mr. Albright, the first man who appears to have tried to make the Hangover Ridge the eastern boundary of a Tennessee grant. William Williams testified that he understood from his uncle William Williams that the line ran up Hangover, while William Williams himself was most clear and positive in his testimony that it ran up Slick Rock Creek to the Fodderstack (p. 177).

The witnesses John Debity and James Farr had taken leases from the North Carolina claimants (Rec., 853-854), and witnesses Kline and Nichols lived on land on Little Slick Rock, which was admittedly in Tennessee. (Rec., p. 1354.)

Thus it may fairly be said that while the testimony as to the traditional location of the line up Slick Rock was strong and founded upon statements by men present when the line was run, the tradition as to Hangover had no such foundation and was based upon alleged statements by men shown to have declared that the line ran up Slick Rock or to have acted upon that theory.

Counsel for defendant in their brief, at page 56, contend that the testimony of N. G. Phillips "would not carry him to the neighborhood of Hangover Mountain or Cold Spring Knob on the Hangover Ridge or Lead," although this witness testified positively that he followed Slick Rock Creek four or five miles (Rec., p. 163), and that he followed up the spur between Little Slick Rock and Big Slick Rock, which is Fodderstack Lead. (Rec., p. 164.)

Likewise, counsel for defendant's contend (brief, pp. 57-58) that the testimony of the Indian Ropetwister "unquestionably would put the line on Hangover Ridge," although the testimony of this witness was that the line ran from the mouth of Slick Rock up Slick Rock, across Little Slick Rock close to its mouth, and that it is about three miles from where it crosses Little Slick Rock to where it leaves the creek, which is practically the exact distance from the mouth of Little Slick Rock up Big Slick Rock to the Fodderstack Lead.

(c) THE TELLICO TRADITION. Dr. J. W. Patten, a man of intelligence and standing testified clearly and positively that Thomas C. Tatham and William Graves had both told him they were present when the Commissioners ran the line in 1821 and that they ran the line along State Ridge and across Tellico, and that they told him about the holly tree which marked the 86th mile (p. 868). John Dockery testified that William Graves and William Allen both told him they were on the State Line survey and that the line ran on State Ridge and across Tellico (p. 15). D. D. Deweese (p. 222) and E. R. Hunsecker (p. 219) testi-

fied that William Graves had told them the same thing and pointed out the line to them. William Jenkins testified that he heard Mr. Foster say he was present when the Commissioners ran the State Line and that they ran down State Ridge and crossed the head of Tellico River (p. 166).

Opposed to this testimony is that of H. H. Miller and Charles Seymour who testified that Joe Graves told them he had been present at the running of the State Line, that he was a packer 16 or 18 years old, and that the party ran down State Ridge in a fog and marked the line to the point where it dropped down to Tellico; that the next morning when the fog lifted, they found their mistake and sent him and another man back to cut out the State Line marks which had been made on the ridge, "and they went back a piece and cut out a piece and they thought it was foolishness and a litt'e too much work and sat down, and they went back and they all got on a high peak and made a plat of the dividing ground and after that they just surveyed on the main lead but never went back and surveyed around the head waters of Tellico" (p. 985). John W. Stratton (p. 983) testified that he heard Levi Washburn tell a similar story and Charles Seymour testified that Sol Graves, a brother of Joe Graves, claimed he also was present (pp. 984-5).

The incredible character of this story is patent. The strangest thing about it is that any intelligent person should have been willing to believe that the State Line Commissioners were as shiftless and faithless to their duty as these mountaineers professed themselves to have been in the mat-

ter of destroying the marks erroneously made. It is a matter of record that the Commissioners were men of the highest integrity and competency (p. 1092). Robert Armstrong, the surveyor for Tennessee, had a long record for distinguished public service both before and after 1821. William Davenport, the Surveyor for North Carolina, was likewise a man of character and standing. That such men, charged with the duty of establishing and marking the line between two States should guess at the location and length of more than eleven miles of it, is unthinkable. The facts are that the lines on State Ridge were not destroyed, that the most notable State Line mark in that section is the 86 M on the holly *west* of Tellico, where the party camped, and that the line from Tellico up to Jenks Knob was and is marked. The Commissioners not only destroyed no marks on State Ridge, northeast of Tellico, but kept on marking the line southwest of it. Instead of a mere sketch map of the ridge around the head waters of Tellico, they made a correct plat of the line down State Ridge, across Tellico and up to Jenks Knob, and with mile circles showing its its actual length, though they did not sketch in the fork of Tellico which the line crossed. The tree marked 86 M is in fact 27.6 miles from the tree marked 59 M and is not on the line claimed by Tennessee at all.

Mr. Seymour testified that this story was told him to explain the fact that the map of the Ocoee Land District, which was supposed to have been surveyed for the State of Tennessee in 1836, was so far from correct that it was evident the surveyors never surveyed the divide around the

head waters of Tellico, that the actual lines varies as much as a mile from the lines laid down on the Ocoee District Map (1048-51). In fact, Seymour seems to prove that the Ocoee surveyors did merely guess at and sketch in the location of the ridge which they made the eastern boundary of the district. Witness Hale also testified that the surveyors of the Ocoee District did not sectionize the "pocket" at the head of Tellico (p. 1158).

The tradition in favor of Tellico is supported by the very name of State Ridge as well as by the 86 mile tree, which has long been a landmark in that country.

NO TREES BEARING STATE-LINE MARKS ON HANGOVER RIDGE.

On page 27 of Defendant's Brief the statement is made that "The Special Master found as a fact (Rec., 1377) that there were trees bearing State-line marks made about the year 1821 on the Hangover Ridge or mountain." The actual statement of the Master was, "I am of the opinion that those two trees bear marks similar to those used in marking the State-line, and that they were marked about the year 1821."

There was never any claim that there were more than two trees on the Hangover Ridge that were State-line trees, which were a sour-wood and a black or red oak. In reference to those particular trees Hale, who claimed to have discovered them, says, on page 1327 of the record, that all of the marks that he observed on Hangover Ridge, resembling State-line marks, might have been made to indicate

North Carolina corners and trails, and on page 1333, he says he never knew of a sour-wood being marked as a State-line mark unless the one described by him on Hangover is such, and that as to that tree he did not know whether it was a State-line tree or not. This sour-wood tree was admittedly so decayed on the inside that it was impossible to tell the age of the marks purporting to be State-line marks, and with reference to this tree and all other trees on that ridge, Williams, an expert witness for the defendant, says that he never saw any trees on that ridge that satisfied him that there were any trees at all on the ridge that were ever marked as State-line trees, and that in his opinion it was impracticable to tell the age of any so-called State-line marks on the sour-wood because it was so decayed. (Rec., 1433-34.)

With reference to the black oak Hale says it was on the ridge running from the Hangover to the mouth of Slick Rock Creek. (Rec., 1336.) Hale also says, on page 1318 of the record, that the marking of a North Carolina corner consists of a cross on a tree, witnessed by two hacks above the blaze; in other words, a cross witnessed by lines precisely similar to the State line marks. H. P. Hyde, an expert surveyor, and a witness for the complainant, states on page 825, that this black oak tree had a cross on it, and that it was the beginning corner of a North Carolina tract.

Coming to the testimony of the witnesses for the complainant on this subject, we find that Burns and Gannett, two of our expert surveyors, searched very carefully over Hangover and found no marks that would indicate that

any tree there had been marked as a State-line tree, and in that they have confirmed the testimony of Hyde (Rec., 827-835), Hayes (Rec., 794), Carver (Rec., 855), Slagle (Rec., 753) and Bogle (Rec., 812-815-824). Hyde and Bogle described with considerable detail the marks on those trees and Hyde says that the marks on the black oak were not axe marks at all, and that if they were made with an axe, that they were made with a smaller axe than was used in making the State-line marks, and that there were no State-line marks on any of the trees enumerated.

The Master did not find postively that those were State-line trees, as the Court will observe from the quotation. But if he had had the benefit of the researches that have been recently made, and the testimony of the surveyors Burns and Gannett, and other surveyors testifying for the complainant, together with the admissions of Williams, the Master, in our opinion, would not have found what he did as to the similarity of the marks. Compared with fifty-three trees bearing State-line marks on the Slick Rock line, shown in detail in the Schedule on Complainant's Exhibit D, only one of which, tree No. 30, was questioned in any way, two trees on the Hangover line furnish by their doubtful marks very slender support for the contention that a line on Hangover was adopted by the Commissioners after the line up Slick Rock had been so marked, and the confirmation of the well marked line up Slick Rock by the Commissioners' plat and the field notes, would seem to negative completely the idea of abandonment of the Slick Rock line.

NORTH CAROLINA CONTENTION AS TO LOCATION OF STATE-LINE.

On pages 44 and 45 of defendant's brief there are set out four different locations which it is claimed North Carolina has claimed from time to time. The first of these, over Little Fodderstack Ridge, is on the line surveyed by McClelland, a surveyor appointed by the State of North Carolina, but it is in evidence that the State of North Carolina subsequently appointed surveyors Hyde and Lovingood to run the State line, and that they did locate it, in 1897, upon the precise location claimed by the complainant in this case. Record, pp. 208-218.

The second line, described as "another traditional line" is described without any evidence whatever to indicate that the State of North Carolina ever claimed such a line. "Still another location," is said to be found in North Carolina grant No. 8234, which grant was issued upon entry 920, the location of which appears in the plat opposite page 92, consistently with the line claimed by the State of North Carolina in this case.

In this connection defendant claims that the map made in 1837 by R. Deaver, the principal surveyor of North Carolina, confirms the Tennessee contention as to location of the State-line. It appears upon the face of this map that it did not purport to be a survey of the State-line; that its general courses are consistent with the North Carolina contention and wholly inconsistent with the Tennessee contention. That part of the State-line which evidently corresponds to the Telico section, is expressly marked "State line

and Main Dividing Mountain," and has a distinct southwesterly bearing on approximately a straight line, corresponding closely to the North Carolina contention and absolutely inconsistent with the Tennessee contention. While the line immediately south of the Tennessee River does not show Slick Rock Creek it has the same general course as Slick Rock Creek for five miles, namely, almost due southwest. The map also shows that the State line is more than two miles below the mouth of Cheoee River. Going south from the river the line of the Deaver map goes first to the right and then to the left, precisely as the line up Slick Rock and Fodderstack goes, instead of going first to the left and then to the right, as the Hangover line runs.

In the face of these facts defendant treats the Deaver map as one of "the salient facts applicable to the entire line sustaining defendant's contention and inconsistent with complainant's claim."

MAPS OF THE OCOEE DISTRICT IN TENNESSEE.

The map of that part of the Ocoee district bounded on the north by the Tennessee River and on the east by Slick Rock Creek and Big Fodderstack Ridge, shows that the creek and the ridge were made the eastern boundary of the Ocoee district, and that the sections along the creek and ridge were laid out as fractional sections. Counsel for defendant argued from the passage of the law in 1854, permitting the entry of vacant lands in the Ocoee district, "whether the same be designated on the map of said district or not," that the lands in the Slick Rock basin were such

vacant lands. There were such lands in the Tellico section to which the statute would apply.

It appears from the plat filed as Exhibits A and B in defendant's brief, as well as in plate attached to the depositions of Seymour and Hale, that the surveyors of the Ocoee district did not sectionize all of the land lying between State ridge and the line claimed by Tennessee as the State line. The statute of 1854 would clearly have applied to these unplatted lands in Telico, and may have applied to other lands in the district. Although the Ocoee district was laid out in 1836, and entries were made upon some of the land in dispute in the Telico district in 1842, no Tennessee entries were ever laid east of Slick Rock until 1883.

THE MAP OR PLAT OF 1821.

In this case the Tennessee original of the two documents which the Commissioners designated as "the plats which accompanies this report," is frequently referred to as the Map of the Commissioners of 1821. As a matter of fact, the certificate upon the face of the document itself recites that the Commissioners "do hereby certify that the above is a true and correct plat of the dividing line between the said States, as settled, run and marked by us." Upon each side of the line so platted, the correctness of which was certified by the Commissioners, appear markings indicating mountains, streams, paths and other geographical features, ***but the certificate relates solely to the plat of the dividing line*** which was actually settled, run and marked. Thus, while the whole document may be called a map, the Com-

missioners expressly designated it as a plat and limited their certification of its correctness to the dividing line.

This Commissioners' plat speaks clearly as to the *courses* and *distances*, within general limits. Upon the face of this plat, immediately above the certificate of the Commissioners, appears a compass or meridian star indicating the North point, by reference to which the bearing of any particular part of the line can be computed within a few degrees. The scale of the plat being indicated upon its face (800 poles to the inch) and the end of each mile being indicated by a circle, it is also possible to approximate closely the length of any particular part of the line. The haste with which the survey was made precluded the possibility of measuring accurately upon the ground the minor deviations of ridges and streams upon which the line was located and measured, and the smallness of the scale of the plat (2½ miles to the inch) prevented the platting of such minor deviations even if the surveyors had actually measured them.

The Commissioners' plat shows that, South of Tennessee River their line had a distinct general Southwest bearing for nearly seven (7) miles and then turned abruptly Southeast for a distance of three (3) miles, to the eleventh mile circle South of the River, where it took another and less abrupt to the Southwest. *The witnesses for both parties computed from the plat itself the bearings of these two portions of the line and in each case agreed within a very few degrees.* After applying his instruments to the Commissioners' plat, witness, Hale, for the respondents, testified that the general bearing of the line on the plat for the first

seven (7) miles South of Tennessee River, was South 44-1/40 West (Record, pages 1135-1205). Witness Burns, for the petitioners, testified the bearing of the same line was South 43 degrees 25 minutes West (Record, page 247). As to the general bearing of the line for the next three (3) miles, witness Hale computed it upon the plat as being south 20 degrees east (Record, pages 1135-1205); witness Burns calculated the same bearing to be south 19 degrees 15 minutes east (page 248).

Witness Hale testified that the bearing of the line claimed by the respondents, from the south bank of Tennessee River to Hangover was south eight degrees west (Record, pages 1135-1191); witness Burns testified that the bearing of the same line was south nine degrees 39 minutes west (Record, page 247). Witness Hale further testified that the bearing of the line claimed by respondents from Hangover to the Junction was south 60 degrees west (Record, pages 1135-1191-1205); witness Burns computed it as being south 60 degrees west (page 248).

These lines were laid down by witness Hale upon the Commissioners' plat of 1821 and also upon his own map.

Witness Williams for the defendant testified that, according to the bearing indicated by the meridian star, the general bearing of the line on the plat from the south bank of Tennessee River for a distance of about seven (7) miles would be 44 degrees.

Thus it clearly appears that, by using the meridian star in the customary manner as an index of the bearings laid down on the plat, it is possible for any competent surveyor

to determine rather closely the bearing of any part of the line laid down on the plat.

The necessary limitations of the plat clearly appear from the foregoing statement. The smallness of the scale (800 poles or 2½ miles to the inch) precludes the possibility of laying down accurate lines of short distances, but the presence of the mile circles gives a very definite check upon the distances actually run. The very short time within which the line was surveyed precludes the possibility that the Commissioners actually surveyed the mountains and streams indicated on their plat, excepting in so far as they were actually followed by the surveyed line, and the small scale of the plat precluded the possibility of laying down mountains and streams with any degree of accuracy. The topography of this plat is necessarily a very rough sketch and the short time within which the plat was made (the Georgia line having been reached on August 24th and the final report signed at Knoxville seven days later) precluded the possibility of laying down the details of the topography of the country with much refinement, even if the surveyors had done all the work necessary to furnish the data for such a map.

The original survey having been made according to the compass, the variation of the magnetic needle during the period which has elapsed since 1821 may amount to as much as five degrees, but the precise variation differs at different points, being affected by local conditions. In this case, the line which the Commissioners considered as running due south to the Georgia line is actually about five de-

grees off from due south, indicating in a general way that the variation in the magnetic bearing in that locality is probably about five degrees. Making due allowance for magnetic variation and for the speed and the instrument with which the survey was made, errors of as much as ten degrees might be expected in the Commissioners' plat. In this case, the differences in the bearings of the disputed lines are so great that a difference of ten degrees could not affect the determination as to which contention is correct. For example, the difference in bearings between the line from Tennessee River to Fodderstack Mountain and the line from Tennessee River to Hangover is 35 degrees; the difference in bearing between the line from Fodderstack to Junction and the line from Hangover to Junction is 50 degrees; the difference between the bearing of the line from County Corners down State Ridge and the line starting from County Corners around the head of Tellico is nearly 90 degrees. (pp. 1546-7; 1574; 322; 247-8.)

The plat also indicates beyond peradventure that the line struck the south bank of Tennessee River at the mouth of a Creek and followed the creek more than a mile. The line claimed by North Carolina followed the Creek five (5) miles while the line claimed by Tennessee follows no stream at all and is half a mile from Slick Rock Creek, the stream nearest west of it, and a mile and a quarter from the nearest point on Cheoah River, the stream east of it.

The plat also shows only two of the three forks of Tellico and indicates that the line passed around them, but the bearing of the line in the Tellico section and the distances at

which it strikes the trading path and the Unaka Turnpike preclude the possibility of carrying the line around the head of the middle work of Tellico where Tennessee now claims it to be. In other words, the shape of the line, its general bearing as indicated by the meridian star, and the 93rd mile circle at the point where the trading path strikes the line from the Valley Towns and the 101st mile circle at Unaka Turnpike, all give the line a location on the ground which the middle fork of Tellico does in fact cross and preclude the possibility of a line around the head of Tellico (pp. 249-50; 414; 1449).

On page 80 of defendant's brief it is declared that "the evidence shows it impossible to locate the boundary line, even where it is not disputed, along the crest or extreme height of the mountain by the sources, judged by the north and south points of the compass, with the short lines shown on Commissioners' map of 1821," and in support of this quotes the testimony of Williams, Hale and Muller to the effect that they were unable to so locate the line in accordance with the plat of 1821.

An examination of the testimony of these witnesses shows that they arbitrarily disregarded all references to permanent objects shown on the plat in the Commissioners' report, and ignored the fact that the line followed and was marked along the meanders of the mountains and streams, which the State-line surveyors had not sufficient time to survey in detail, and which the scale of the plat would not permit to be shown if they had been so surveyed. In short, these wit-

nesses undertook to use the Commissioners' plat and report in a manner wholly contrary to surveying and engineering practice, subjected them to tests to which such documents are never practically subjected, and wilfully disregarded all of the natural monuments, the location of which would serve to correct any minor errors in the plat.

As a result of all his work, Witness Burns testified that making due allowance for the time at which and the haste with which the original survey and plat were made, and the small scale upon which the line was platted, the plat of the land was remarkably accurate, but that the topography was sketched in, the size of the streams being greatly exaggerated, "that by taking the plat around, starting at some undisputed point which can be located upon the plat and also upon the ground and using the plat alone as your guide, you can get close enough to the original marks to find them, and you can follow the line in that way, using the plat as your guide. If you take the plat, together with the report which accompanied it, any intelligent engineer or surveyor can follow the line in the disputed, as well as the undisputed, section" (p. 266). Using the plat and report in this manner, Burns testified that he had himself actually located the line of marked trees in the disputed as well as the undisputed parts of the line, and found it to be in accordance with the North Carolina contentions; that neither the plat nor the report of the Commissioners of 1821 furnished any support to the Tennessee contention as to the location of the line up Hangover and around the head of Tellico. Witness Gannett testified that he had actually located the line by this method. (Record, pp. 116, 133, 134, 138.)

DECISION IN STEVENSON VS. FAIN AS TO THE STATE LINE ON TELICO.

The decision of the Circuit Court of Appeals, in 116 Federal Reporter, 147, sustaining the contention of Fain as to the location of the State line down the ridge and across Tellico, Fain holding territory east of State Ridge and Tellico under grants from North Carolina, is declared in defendant's brief (p. 115), to have been predicated upon evidence materially different from that disclosed in this record. The evidence in the case of Stevenson vs. Fain does not appear in this record, but in the opinion of Judge Lurton, at page 152, the court says:

> "The ridge upon which the dividing line is located at that point (County Corners), continues in a southwestwardly course until it gradually descends to the Tellico River. Crossing Tellico a spur is ascended which leads on to Jenks' Ridge at Gold Bryson's Gap where the marked line is again picked up."

There is nothing in the record in this case to indicate the location of Gold Bryson's Gap but the evidence all goes to show that the line claimed by North Carolina ascends Jenks' Ridge to Jenks' Knob; whether Gold Bryson's Gap is on the way up the ridge does not appear but might be inferred from the language of Judge Lurton.

Jasper Fain, who was one of the parties to the Fain suit, was asked upon cross-examination in this case (p. 211):

> "Following down the course you claim, you would

follow down the State ridge to the Tellico River where the State ridge diminishes. Then you cross the Tellico River, and, some little distance up on the other side, you would strike the Jenkins' Ridge and follow that up to where it strikes the main ridge and goes on around, is that correct?

"A. Yes, sir."

"The Jenkins Ridge" is evidently a typographical error for Jenks' Ridge. In any event the record does not furnish the slightest ground for any claim that the line which the Circuit Court of Appeals sustained as the true State line in Stevenson vs. Fain, is in any respect different from the line claimed by North Carolina in this case.

On page 127 of defendant's brief, the question is asked, "Were there two holly trees marked '86-M'," and in support of the argument that there may have been two such trees, it is asserted that the holly tree is not the right distance from well known and undisputed points on the boundary line, to be the eighty-sixth mile tree.

In the evidence of tradition as to the location of the State line the eighty-sixth-mile tree appeared so frequently as to show that it was a well known object, which fact had great weight with the court in Stevenson vs. Fain. In that case the same witness, Hale, undertook to make the same argument, that the Commissioners had marked the line claimed by North Carolina but subsequently abandoned it for the line claimed by Tennessee, a view which the court refused to accept.

Counsel for the defendant insist that the holly tree is not

located at the right point for an eighty-sixth-mile tree, and undertake to prove that contention by measuring back from the one hundred and first mile tree to the holly tree. The undisputed evidence shows that the Commissioners ran their line not from the southwest northeast, but from the northeast southwest, and that the measurement from the south bank of the Tennessee River to the holly tree is 21.62 miles, or 86.62 miles from the point of beginning.

Gannett and Burns' survey also shows that the distance from the eighty-sixth-mile tree to the one hundred and first mile post at Unaka turnpike, is 16.30 miles, showing an excess of 1.3 miles between those two points. Of the distance between the eighty-sixth-mile tree and the one hundred and first mile tree, all but 1.14 miles, i. e., from Jenks' Knob to the one hundred and first mile post, is upon the undisputed line. The excess of six-tenths of one mile between the seventy-fifth mile at Junction and the eighty-sixth mile tree at the holly is not surprising, in view of the time and the conditions under which the survey was run.

DAVENPORT FIELD NOTES.

On pages 159 to 169 of defendant's brief there is pointed out at great length alleged discrepancies between the map of 1821 and the Davenport field notes, the testimony of the witness Williams upon this point being set out at length. Upon cross-examination of this witness, pages 1565 to 1568, most of these criticisms were shown to be technical, unreasonable or groundless. On page 164, defendant's brief, sets out certain alleged differences between the plat of a

portion of the map of 1821, traced on Burns' Exhibit BB, and a plat of the Davenport field notes and, on page 165, the statement is made, "that these differences and alterations were made by Burns with the distinct purpose of making his tracing conform to the Davenport field notes." When it is remembered that the only copies of the map of 1821 available to Burns, or any other person, were copies of the original map—no two of which appear to be exactly alike—and when it is further remembered that the differences alleged consist of minute lines across the courses of the platted line, between mile circles, to indicate the number of courses within each mile, the unreasonableness of any serious criticism of such minor errors appears. But the charge that these minute changes were deliberately made by Burns for the purpose of making his tracing conform to the Davenport field notes appears from the fact that *nearly all of the alleged differences* made in the platted line *contradict* instead of confirm the Davenport notes. For example, he is criticized for showing between the sixtieth and sixty-first mile circles, three courses, while the original map show four courses. The Davenport notes also show four courses. He is also criticised for showing between the sixty-fifth and sixty-sixth mile circles five courses while the map shows four courses. At this point, the Davenport notes also show five courses, but if counsel for defendant had examined complainant's Exhibit B, which was made before the Davenport notes were discovered, they would have found that Burns also showed five courses in that case. In short, the evidence introduced to support the serious charge against

Burns not only does not support the charge but the exact contrary. When it is remembered that Exhibit B B was designed solely to compare the *general course* of the Davenport line with the general course of the Commissioners' line, and of the surveyed lines, the correctness of which is not questioned, the attack upon Burns seems absurdly unjust.

THE EVIDENCE OF ANCIENT MAPS.

On pages 177 to 181 of defendant's brief it is contended that Tennessee's contention as to the location of the State line is shown by nearly all of the ancient maps produced. Examination of these maps, which are in the Congressional Library, will show, first, that as to the section immediately south of the Tennessee River the maps, without exception, show the line going, first, practically due southwest and then turning southeast, as claimed by North Carolina, but very few of the maps indicating any stream along this course. The maps will show, secondly, as to Tellico, a divided report, a number of them showing Tellico crossing the State line and others showing it wholly west of the State line.

The final criticism of the map of 1821 appears on page 181 of defendant's brief, in which it is declared that neither the contention of North Carolina nor of Tennessee conforms, in respect of distances, to the map of 1821. We have already shown that on the general course laid down on the plat of 1821, from the end of the fifty-ninth mile to the end of the seventy-fifth mile, the marked and surveyed lines from the fifty-ninth mile tree to Junction is almost exactly sixteen miles long, while the line by way of Hangover to the

Junction is only fourteen miles long. We have also shown that the line from Junction to the eighty-sixth mile tree, seven miles of which is undisputed, is 11.62 miles long and the line from Junction to Jenks Knob is 12.77 miles long on the line claimed by North Carolina (from Station 716 + 94.3 to Station 1391 + 47; 67,452.7 feet) while it is 18.92 miles long on the line claimed by Tennessee (from Station 716 + 94.3 to Station 1716 + 06.7; 99,912.4 feet). (See tables and measurements on complainant's Exhibit D.) We have also shown that *the greatest discrepancy between the length of the line* shown by the plat of 1821 and the actual length of the marked line on the ground, *occurs in the undisputed part* between Jenks Knob and Unaka turnpike amounting in that distance to about 1.3 miles.

ALLEGED INACCURACIES IN COMPLAINANT'S BRIEF.

In reply brief filed on behalf of the State of Tennessee, pages 2-5, it is contended that four distinct inaccurate statements appear on page 12 of the brief filed on behalf of the complainant:

> "1. As to the distance from the 64th mile tree to the Tennessee River."

It is stated that the statement in complainants' brief that, "from the Catalauchee Turnpike to the 64th mile tree about one mile northeast of the Tennessee River, the line is not in dispute," is inaccurate, because the measurements of Burns and Gannett from the 59th mile tree along the undisputed boundary line toward Tennessee River 5 miles

ends just 1820 feet from the river. As a matter of fact, the distance from the end of the 64th mile to the lone pine, measured along the marked line, is 2095 feet, as shown by the measurements given on Complainants' Exhibit D, and also the measurements of Gannett's survey from the turnpike northeast of the 59th mile tree, as shown on pages 458 to 459 of the record, and Burn's survey from the turnpike to the Tennessee River, as shown on pages 529 to 531 of the record. But the distance from the end of the 64th mile to the river, *along the course laid down on the Commissioners' plat*, lacks only about 1,000 feet of being one mile, while the length of the actually marked line from the end of the 64th to Slick Rock Creek is 1.02 miles.

It is further declared in Defendant's reply that, "the materiality of this inaccurate statement on behalf of complainant is manifest when it is considered that the mouth of Slick Rock Creek is not visible at all from where the 64th mile tree formerly stood, according to the measurement of Burns and Gannett, but it is necessary to run back from the river about a mile before a point is reached where, even according to Burns, there is a glimpse, not of the waters of Slick Rock, but of the gorge or bed of the creek." This statement is absolutely contrary to the testimony of Burns on page 726 that, for a distance of 200 or 300 feet forward and backward from the end of the 64th mile, the gorge at the mouth of the Slick Rock Creek is plainly visible and that it was also visible at a point one-half mile or a mile further back on the Smoky Mountain. While there is no state line tree at the end of the 64th mile, tree No. 21

on the schedule of trees upon the Gannett and Burns map is noted as having been pointed out by Hayes as the 64th mile tree and is actually located within 130 feet of the end of the 64th mile, and is a white oak, which is the kind of tree called for at that point in the Davenport notes.

> "2. The next inaccurate statement is that when the commissioners reached this point, to wit, the 64th mile tree, they were running about south 45 degrees west."

By reference to the Gannett and Burns map it will appear to the Court that the line approaching the end of the 64th mile is running about south 45 degrees west. Moreover, defendant's witness, Hale, testified (Record, page 1194), as follows:

> "Q. 193. Can you tell us at what angle down to that point of the 64th mile tree the line approaches the river, say for about 2½ miles back?
>
> "A. On which map?
>
> "Q. 194. On map of 1821.
>
> "A. About an angle of south 45 degrees west, something like that, I could not tell exactly."

> "Q. 200. The general trend from as far back as the 59th mile tree is about south 45 degrees west, is it not?
>
> "A. Yes, something near that."

> "3. Approaching the Tennessee River from the northeast along the undisputed line, Hangover is

not to the left, as stated on the brief, but directly in front."

Inspection of the map, as well as the testimony of the surveyors, will show the Court that the inaccuracy is in the reply brief and not in the statement in complainant's brief; it will show further that a projection of the state line on the course upon which it approaches the river would strike Big Fodder Stack Mountain.

> "4. The course from the 64th mile tree to the mouth of Slick Rock Creek is not south 75 degrees west, as stated on said brief."

The bearing from the 64th mile tree to the mouth of Slick Rock Creek is by actual survey about eighty degrees.

In the same connection, it is said in the reply brief, page 5, "Just why it is stated on page 13 of complainant's brief that the commissioners after turning down the river from the fore and aft tree and reaching a point opposite the mouth of Slick Rock, 'took the course across the stream,' we cannot imagine, or just what authority there is for making that statement we do not know, because there is not a syllable of proof in this record to justify that statement."

The reason for the statement is, first, that Thomas Tatham, who was with the original party making the survey, told witness N. G. Phillips that, "they come down to the river and could not get across the river, and he said that they located a big spruce pine tree at the mouth of Slick Rock Creek and went down, I think, to the ford to Tellassee

and there crossed the river and come up on the south side of the river and come up to the place where they had located it and when they got back to the mouth of Slick Rock Creek they run up the creek."

Record, p. 157.

NORTH CAROLINA ENTRIES AND GRANTS WITHIN THE DISPUTED TERRITORY.

On page 5 of defendant's reply brief complainant's brief is criticised for the statement that, "in all these entries and grants the State line is called for as running up Slick Rock Creek," and the statement is made that, "the evidence of Hayes and Burns is conclusive to the effect that North Carolina, in allowing entries and issuing grants, had not stopped at Slick Rock, but extended some three or four miles to the west and north of Slick Rock to the top of Little Fodderstack Ridge and to the west thereof."

An examination of the entries and grants introduced by North Carolina (Record, pp. 90 to 98) will show that none of the lands there granted extended beyond that part of Slick Rock Creek which North Carolina says is the dividing line between the States, while they all did make Slick Rock Creek the State line at some point. An examination of the testimony of Hayes and Burns will show that there is no evidence that the State of North Carolina ever granted any land west of the State line, as claimed by North Carolina, the evidence being only as to entries laid by individuals, over which the State exercised no control.

Further reference is also made on page 6 of the reply brief to grant No. 8234, based on entry No. 920, the location of which is shown on the plat opposite page 92 of the record as being along Slick Rock Creek.

MARKED TREES ALONG SLICK ROCK.

On page 9 of the reply brief it is contended that the testimony of Dr. Patton with reference to the pine tree near the mouth of Slick Rock Creek and the line down Slick Rock Creek contradicts the testimony of Burns as to that tree and line. An examination of Dr. Patton's evidence (Record, pp. 868-870) will show that Dr. Patton testified clearly to marks entirely consistent with the marked trees indicated by Burns and Gannett.

Especial emphasis is laid upon the claim that, "the undisputed facts are, as shown by the testimony cited in our original brief, that for a distance of somewhat more than three miles along Slick Rock Creek not even Burns or Gannett was able to find any marked trees." When it is remembered that Dr. Patton made his search in the year 1867, nearly 50 years ago, and in view of the testimony of nearly all of the witnesses to the effect that time has destroyed many of the trees, and the fact that many of the State line trees mentioned in the Hebard cases have since disappeared, it may be fairly inferred that Dr. Patton found trees which cannot now be found, or which have lost all their external evidences of State line marks. Moreover, it is in evidence that witness Hyde (Record, pp. 830 and 831) in the year

1897, found a number of State line trees within this three-mile stretch. He testified as follows:

"The fore and aft marked trees along the creek were below the mouth of Little Slick Rock. The side line trees marked with three hacks, we found both above and below the mouth of Little Slick Rock, until we got nearly to the point of the ridge. Between the mouth of Little Slick Rock and the ridge we found half a dozen or perhaps more marked trees, but it was not marked as well above Little Slick Rock as it was below.

"We blocked a birch above the mouth of Little Slick Rock about one-half mile, on east side of creek; have the block here in my saddle pockets. The marks showed all right, but I couldn't count the growths. It was 120 poles above the mouth of Little Slick Rock.

"(Witness here hands block to counsel for complainant.)

"We found two hacks and a blaze in this birch. There were two birches marked about there. This birch stood about a rod from the creek. It was marked fore and aft on both sides.

"I file said Block as Exhibit No. 5 to my deposition.

"We only cut out one hack—the others are still on the tree, and when we cut it out, as the sap was up, the bark slipped off. Most of the marked trees above the crossing of Tallassee Trail were found on east side of creek, though a few were on the west side. Below the Tallassee Trail we found them on both sides. Some of the marks faced the creek and

some were on trees standing near the creek and facing from the creek. All the trees we found marked stood near the creek; we searched for some distance on both sides; one or two marked with two hacks and a blaze were facing from the creek.

"It is very rough up the creek. We began at the mouth of Slick Rock Creek. Before beginning we made preliminary investigations, searching the points of all ridges on both sides for State line marks. Before we went down to the creek at all, we searched the Hangover Lead for State line marks."

Under the head of tradition there is a great mass of evidence as to the existence of the large pine tree near the mouth of Slick Rock Creek which was selected by the commissioners as their objective in crossing there.

Phillips testified that Thomas Tatham told him that the large pine tree was selected by the commissioners when they were on the north side of the river as their objective point on the south side.

Record, p. 157.

and William Jenkins testified to personal knowledge of the tree while it was still standing.

Record, p. 167.

On page 11 of the reply brief attention is called to the lines laid down upon Exhibit A to Onley William's deposition (p. 76) by John L. Williams. Examination of the record will show that, at the request of counsel of Tennessee, witness Williams laid down a line 7 miles south of the river on the bearing of the 65th mile, namely, south 75

degrees west, apparently with a view to discrediting the general testimony of witness Burns that the general direction of the line approaching Tennessee River was the same as the line from Tennessee River to Big Fodder Stack. The thing which Burns actually testified (Rec., p. 247) was that from the 59th mile tree to the south bank of Tennessee River, the bearing on the commissioners' plat is south 58 degrees west; that the bearing from the 59th mile tree to the sharp turn in the line, between 6 and 7 miles from Tennessee River, was south 50 degrees and 40 minutes west, while the actual bearing from 59th mile tree to Hangover was south 29 degrees 8 minutes west. He further testified that the bearing on the commissioners' plat from the south bank of the river to the first decided break, nearly 7 miles southwesterly, was south 43 degrees 25 minutes west, while the bearing from the mouth of Slick Rock Creek to Big Fodder Stack is actually south 41 degrees 28 minutes west, and the bearing from the south bank of the Tennessee River to Hangover is south 9 degrees 39 minutes west. It is perfectly evident that the testimony of this witness was directed to show that the course of the line from the river to Fodder Stack was in general harmony with the course of the line from the 59 mile tree to the river, while the course of the line from the river to Hangover was entirely inconsistent with the course shown on the commissioners' plat for a distance of six miles north and approximately seven miles south of the river.

The testimony of Burns (Rec., pp. 246 to 250, 251) indicates clearly and completely the method in which Burns

used the commissioners' plat and the results derived therefrom.

WHERE AND HOW DAVENPORT NOTES WERE FOUND.

On page 13 of the reply brief an attempt is made to show that there was some discrepancy between the testimony of Mrs. Cilley and that of William Davenport Jones as to the place, or the character of the piece of furniture in which the Davenport field notes were found. An examination of the testimony of this witness shows that there is neither conflict nor doubt as to the place where this book was found. William Davenport Jones spoke of it (Rec., p. 607) as a large desk or sideboard; and Mrs. Cilley spoke of it as a sideboard containing a drawer, which, in turn, contained a secret drawer.

Rec., pp. 640 and 641.

Complaint is made that complainant did not produce Mr. Edmund Jones, who was supposed to be his brother, on November 10, when the so-called field notes were found, although there is no evidence that this Edmund Jones was ever present, the evidence being that the Edmund Jones who was associated with Mr. John Franklin Shields, and was making search for the Davenport notes, was a nephew of William Davenport Jones. (P. 640.)

William Davenport Jones testified (p. 608) that he was asked to look for any old papers that would bear upon the location of the line between Tennessee and North Caro-

lina. In reply to a question as to the party on whose behalf the request was made, he answered:

> "Ned Jones, my nephew, in behalf, I understood it, of Mr. Shields and others of that Philadelphia land company. I think Mr. Shields asked me to search for any papers that would bear upon the subject.
>
> "(State of Tennessee objects to any statement between witness and one Ned Jones and Mr. Shields).
>
> "Q. What Mr. Shields was that? A. I have always understood he was attorney for the Yadkin River Land Co.
>
> "Q. John Franklin Shields, the gentleman sitting in this room? A. Yes."

The record discloses the fact that John Franklin Shields, as *amicus curiae*, has filed a brief in this case in support of the Tennessee contention.

AS TO THE STREAM MARKED "CREEK" ON THE MAP OF 1821.

On pages 14 and 15 of the reply brief appears the contention regarding the map of 1821, that "the map shows the line to leave the river about 900 feet below the mouth of some stream, and that from the river it proceeds or runs on a ridge near to said stream," etc.

Inspection of the original plat of 1821, or of the photograph of it, which is on file in this case, will disclose the

fact that the line leaves the river directly along the creek, not 990 feet from it, and that it does not run on a ridge near the stream, and the record fails to disclose any claim by witnesses Hale or Williams for the defendant, that the line runs on a ridge near the stream until it reaches a distance of about two miles south of the river. (See Rec., 1821-1410.)

Emphasis is again laid on the fact that the stream shown upon the plat departs sharply from the line between the first and second miles, but no account is taken of the fact that the platted line is laid down on a course which for five miles south of the river is identical with the general course of Slick Rock Creek. The position of North Carolina with reference to the stream marked "creek" on the Commissioners' plat, is that it purports to be correct only as to the dividing line; that the Commissioners did not purport to survey streams but that they did certify that the line platted on their map is the line which they settled, ran and marked; that the platted line for five miles south of the Tennessee River is consistent in its general direction with the marked line of Slick Rock Creek and with no other.

On page 16 of the reply brief counsel for defendant reiterates the contention that the plat of 1821 does not accord with the North Carolina contention because upon the face of the map it shows a line on top of the mountain to the east of the headwaters of Tellico River, the answer to which is the fact that the platted line in its general courses and distances, conforms to the marked line on the State ridge.

across Telico and up Jenks Ridge, and cannot possibly be reconciled to the Tennessee contention.

Upon the same page of the reply brief counsel for the defendant complains of the statement on page 28 of complainant's brief, that "the report of the Commissioners calls for the following objects * * * a large creek emptying into the Tennessee River where the line crosses that river."

The Commissioners accompanied their report by their plats, together with the express declaration that "said dividing line run by us, in its whole length is distinctly marked * * * agreeably to the plats which accompany this report, and which said plats and reports are certified by us." The report without the plats was too general a description of the line to remove the possibility of dispute; in fact, it was the absence of the plats for a long period of years which gave rise to this dispute. The plats which were part of the reports showed the creek as described.

On pages 21 and 22 of the reply brief there is reiterated the claim that the Cheoah River "approximately conforms to the location of the stream marked 'creek' on the map of 1821." Inspection of the Gannett and Burns map (Complainant's Exhibit D), the correctness of which has never been challenged, or of the topographical map opposite page 1576, shows how absurd such a contention is. The stream marked "creek" on the Commissioners' plat does follow the general course of Slick Rock Creek for a distance of a mile and a half south of Tennessee River. The turn which it

makes at that point to the south is substantially the same turn which Slick Rock Creek actually makes at a point five miles southwest of the river. The Cheoah River, which is a mile and a quarter east of the line claimed by Tennessee, follows for a long distance a general course substantially at right angles to the course of Slick Rock Creek, and is a stream fully ten times as large as Slick Rock Creek.

CONCLUSION.

The contention of North Carolina as to the facts regarding the true location of the State line may be summarized as follows:

The Commissioners left three distinct classes of evidence as to the location of the line which they ran and marked; first, *marks on trees* along the line; second, on *a written report* to the Governors of the two States describing those marks, and also describing the located courses of the line in brief general terms; and, fourth, *a plat of the line* accompanying the report and mentioned in it as being a plat of the line settled, run and marked by them. Any competent surveyor may from those three classes of evidence determine conclusively any material dispute as to the location of the line. Taking the report and plat of the Commissioners to some undisputed point on the State line, he will be promptly and certainly guided to the marked line. Had all of these forms of evidence been available when the first disputes arose as to Slick Rock and Tellico, they would have promptly and conclusively settled the question as to which line the Commissioners actually settled, ran and marked. On the

other hand, it is impossible to support the Tennessee contention either by the evidence of the marked line or by the evidence of the plat, or by the evidence of the report read in the light of the plat which was made part of it.

THOMAS W. BICKETT,
Attorney General of North Carolina.

THEO. F. DAVIDSON,
F. A. SONDLEY,
C. B. MATTHEWS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 4, Original.

IN EQUITY.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

BRIEF ON BEHALF OF THE STATE OF TENNESSEE, DEFENDANT AND CROSS-COMPLAINANT IN THE ABOVE-ENTITLED CAUSE.

FRANK M. THOMPSON,
Attorney-General of Tennessee.

CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

THE STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

THE STATE OF TENNESSEE, DEFENDANT.

IN EQUITY

BRIEF ON BEHALF OF THE STATE OF TENNESSEE, DEFENDANT AND CROSS COMPLAINANT IN THE ABOVE ENTITLED CAUSE.

Statement of the Case.

May it please your Honors:

This is an original suit in equity, instituted by or in the name of the State of North Carolina, as complainant, against the State of Tennessee, as defendant for the purpose, as alleged, of having settled and determined the true location of a part of the boundary line between the two States.

Is

The location of the boundary line is now undisputed from the Virginia line southward to a marked fore-and-aft State-line tree on or near the north bank of the Tennessee River, though complainant in her original and amended bills controverted a small part of the boundary line north of said river.

The true location of two separate portions of the boundary line, involved in what is known as the contentions at Slick Rock and Tellico River, is now the expressed purpose of this litigation, though in her pleadings complainant controverted a much larger portion of said boundary line.

In respect of the controversy in the Slick Rock territory, North Carolina now contends that the State line from said fore-and-aft boundary-line tree, near or on the north bank of the Tennessee River, abruptly turns and follows down the north bank of said river half a mile and there crosses said river to the mouth of Slick Rock Creek, on the southwest bank of said river; thence follows up said Slick Rock Creek for a distance of about five and a half miles; thence departs from the creek up a ridge leading to the Big Fodder Stack peak; thence southeastwardly, following the height of Fodder Stack Ridge to where it strikes the main Hangover Ridge at a point called the Junction, southwest of the mountain peak known as Stratton Bald.

Tennessee claims that the line crosses the Tennessee River directly from the marked fore-and-aft tree on the north bank of said river to the ridge directly opposite, and over and along said ridge known as Hangover Lead or Ridge to the main or Hangover Mountain, and thence by the extreme height of the same to said point known as the Junction, southwest of Stratton Bald peak.

The Tellico controversy arises at a point several miles southward of the Slick Rock territory, where North Carolina claims that the boundary line leaves the main dividing ridge and follows a ridge which leads down toward the Tellico River; thence crossing said river to another ridge, and by that ridge returns to the main and dividing ridge of the mountain.

Tennessee claims that the boundary line follows the main and dividing ridge of the mountain, so that all of the waters of said Tellico River lie within the State of Tennessee.

The territory now comprised within the State of Tennessee was ceded to the United States Government by the State of North Carolina by an act passed in 1789, commonly called the "Cession Act," which described the part of the boundary line involved in this case as being and located "**along the extreme height*** of the Great Iron or Smoky Mountain to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Chota; **thence along the main ridge** of said mountain to the southern boundary of this State."

The above description of the boundary line between the States of Tennessee and North Carolina is the same description which is referred to by the act of Congress accepting said cession and is identical with the description set out in the act of Congress creeting the State of Tennessee, and with the description of the line between the States set out in the first Constitution of the State of Tennessee, adopted in 1796.

In 1821 Commissioners of both States, appointed under the authority of acts passed by the General Assemblies of said States, and directed to run and locate said boundary line "**agreeably to the true intent and meaning**" of said cession act, performed the work so assigned to them, and their joint report of the boundary line as run and located by them was adopted and confirmed by legislative acts of both States passed in 1821, and each of said States insists that her particular contention hereinbefore set out is part of the boundary line so run and reported by said Commissioners and adopted by said confirmatory acts.

Tennessee further insists that even if the said Commissioners attempted to run and report, which Tennessee insists they did not do, the line as contended for by North Carolina, that such line is a clear departure from the boundary fixed by the Cession Act of 1789—that it is a new line not in con-

* Boldface and italics in this Brief and the Appendix are ours.

formity with said Cession Act, and any attempted compact between the States in relation thereto, not having received the consent of the Congress of the United States, is for that reason invalid.

The shifting contentions of complainant, the several acts of both States relating to the boundary line, the report and map of the Commissioners of 1821, and a brief history of the litigation between private claimants of the lands in dispute under grants from both States, are set forth in the pleadings, the substance of which, for convenient reference and to show the issues made by the pleadings, it is deemed proper to here set out.

THE PLEADINGS.

Original Bill.

The original bill alleged in substance:

(1.) That this suit was brought under the authority of an act of complainant State of North Carolina, authorizing the Governor of said State to institute and prosecute such actions and proceedings as may be necessary to establish and protect the boundary lines between complainant and adjoining States.

Rec., p. 3.

(2.) That the boundary between the States of North Carolina and Tennessee "is disputed and in controversy in so far as the same is hereinafter set out."

Rec., p. 3.

(3.) That the territory constituting the present State of Tennessee was ceded to the United States by an act of North Carolina passed in 1789, in which the boundary line from the French Broad River westwardly is described as follows, to wit:

"Thence along the highest ridge of said mountain" (Iron Mountain) "to the place where it is called the Great Iron or Smoky Mountain; thence along the **extreme height** of said mountain to the place where it is called Unicoy or Unaka Mountain, between the Indian towns of Cowee and Chota; thence along the main ridge of said mountain . . . **the southern boundary of this State.**"

And that the deed of cession made by complainant in pursuance of said Cession Act, duly accepted by an act of Congress, followed the same description which was also incorporated in the first Constitution of the defendant State of Tennessee, setting out the boundaries of said State.

Rec., p. 3.

(4.) That in 1799 Commissioners appointed by the State of North Carolina, under the authority of her act of 1796, ran, marked and reported the boundary line between the States from Virginia, on the northern border, to a stone set up on the north side of the Cataloochee Turnpike road.

Rec., p. 3.

(5.) That in 1819, and soon thereafter, both North Carolina and Tennessee passed acts authorizing the appointment of Commissioners to run, mark and establish the remainder of the boundary line from the point where the former Commissioners had stopped, and that in pursuance of said acts both States appointed Commissioners, who ran, marked, and established the remainder of said boundary line from said point where the former Commissioners stopped to its western (southern) terminus, and thereafter the Commissioners jointly filed with each State a report and map setting out that part of the boundary line surveyed by them; and complainant averred that she was informed that said Commissioners also filed field-notes of the surveyors employed to assist them in making the survey, and that in 1821 both States, by acts of their respective General Assemblies, adopted and con-

firmed the report of said Commissioners and the line
by them, as shown by their said report and map.

The provisions of said confirmatory acts are set out i
bill.

Rec., pp. 3-4.

(6.) That ever since the confirmation of said report
location of said line by said confirmatory acts passed by
States in 1821, and until 1892, the respective States, N
Carolina and Tennessee, have recognized the line repo
by said Commissioners as the true boundary line bet
the States, and that said line has been recognized by the
gress of the United States and different departments o
Federal Government.

That said boundary line between North Carolina and
nessee "may be generally described as following **the**
ridge or watershed of the Allegheny Mountain r
which has many local names, such as the
Iron or Smoky Mountain and Unaka or Unicoi M
tain, but between the 'extreme height' of the
Iron or Smoky Mountain and the 'main ridge
Unaka or Unicoi Mountain the Tennessee River h
through the mountain in its northwestwardly course,
that part of the State line which descends from the ext
height of the Great Smoky Mountain to Tennessee R
crosses the river and ascends to the main ridge of Un
Mountain has fallen into dispute," and that a contro
has arisen as to the true location of the State line betwee
extreme height of the mountains northeastwardly of the
nessee River and the main ridge thereof, southwestward
said river.

Rec., p. 5.

The specific contention of complainant as to the loc
of the boundary line is then alleged as follows:

> "That the line between these points"—that is
> tween a point northeastwardly of the Tennessee
> and the main ridge thereof southwestwardly of

river—"**descends from the extreme height** of the mountain northeast of the river to the river, crosses the river to a point in the southwest bank thereof just west of the mouth of a stream known as Slick Rock Creek, follows the creek about five miles to a ridge leading up to the main ridge, follows said ridge to the summit, known as Big Fodder Stack Mountain, and follows the main ridge thence to the junction of the Big Fodder Stack and Hangover Leads, and **thence follows the main ridge** of the Unaka Mountains southwestwardly;"

and that up to the year 1892 said line as claimed by complainant has been conceded to be the true line by residents and surveyors of both States in that vicinity, and said line is the line fixed and located by said Commissioners and marked by them.

Rec., pp. 5-6.

(7) That by various alleged acts, set out on page 6 of the printed record, both States have recognized the boundary line to be up Slick Rock Creek, as claimed by North Carolina.

(8) That when the contest first arose between grantees claiming lands under grants from both complainant and defendant, neither of the original maps alleged to have been made by the Commissioners in 1821, nor the field-notes made by the surveyors acting under the said Commissioners, could be found; that the Capitol Building at Raleigh was burned in 1832, at which time many of the records, which may have included said map and field-notes, of the State of North Carolina were destroyed, and that in 1903 or 1904 there was discovered by the State archivist of defendant the original map filed with the State of Tennessee by the Commissioners in 1821 showing the line run, located, and marked by them, and adopted by both States through acts passed by their General Assemblies; that prior to the discovery of said map surveyors had mistaken certain ancient marks for State lines, "**had mistaken which is the main ridge southwest of the**

Tennessee River," and that said map shows the boundary line to be in accordance with the contention of the complainant, but that the defendant State of Tennessee refuses to recognize, as alleged, "said line as fixed by said map and said Commissioners of 1821, but claims a line to the east of the true line, taking in a part of the State of North Carolina about ten miles long and three and a half miles wide at its widest part, and continues to demand taxes thereon and exercise jurisdiction thereover"; so that—

> "**Said line between a point about a mile northeast of Tennessee River and the junction of Big Fodder Stack and Hangover Leads about nine miles southwest thereof,"**

has become confused, uncertain, and a subject of contention.

Rec., pp. 6-7.

The prayer is that "the boundary line herein claimed may be ascertained and established" by proper decrees of this court.

Rec., p. 7.

Petition of Babcock Lumber & Land Company.

It is to be noted that the original bill, duly sworn to by the Attorney General of North Carolina (Rec., p. 8), restricted the contention and claim of complainant as against defendant State of Tennessee, and her claims to that part of the boundary line about nine miles in length, and beginning at "**a point about a mile northeast of Tennessee River and the junction of Big Fodder Stack and Hangover Leads, about nine miles southwest thereof**" (Rec., p. 7); but, when the Babcock Lumber & Land Company, claiming the land between the disputed lines at the points just stated, gave notice that on May 3, 1909, it would present to this court its petition of intervention (Rec., pp. 11-18), showing the private nature of the controversy, and that it had been settled

in favor of the Tennessee grantees by the United States Circuit Court of Appeals at Cincinnati, counsel appearing on behalf of complainant State of North Carolina moved and were granted leave (Rec., pp. 21, 24) to file an—

Amended Bill.

By the amended bill, after repeating in different forms the material averments of the original bill, the controversy or claim upon the part of complainant North Carolina is extended from that set out in the original bill—that is, from a point "about **a mile northeast of Tennessee River** and the junction of Big Fodder Stack and Hangover Leads, **about nine miles southwest thereof**" (Rec., p. 7), so as to include the entire boundary from a mile northeast of the Tennessee River to the Unaka turnpike road—the allegation of the amended bill in this respect being as follows:

> "Said line, between a point **about a mile northeast of the Tennessee River and a point at Unaka turnpike road, as hereinbefore stated, about twenty miles southwest thereof,** has become confused, uncertain and the subject of contention."

which complainant prayed might be ascertained and established by the decree of this court.

Rec., p. 29.

Answer and Cross-bill of Defendant.

In her answer and cross-bill defendant State of Tennessee admitted and averred in substance as follows:

(1) It was admitted that the territory now belonging to defendant, and over which she exercised and has the right to exercise jurisdiction, was formerly that part of the State of North Carolina ceded by her in 1789 to the United States, and that said Act of Cession was accepted by the Federal Government, and in 1796 the territory covered thereby was

admitted, by an act of Congress, approved June 1, 1796, into the Union under and by the name of the State of Tennessee, and it was further admitted that the boundary line between the States is as described in said North Carolina Cession Act, in the act of Congress accepting the same, and in the first constitution of the State of Tennessee, adopted in 1796.

Rec., pp. 33-34.

(2) It was also admitted that in the year 1796 North Carolina passed an act appointing Commissioners to run and establish the boundary line between the two States, and to mark the same, as provided in the first section of said act, "agreeably to the true intent and meaning of said boundary line" between the respective States, as described in said Cession Act; and it was also true that the Commissioners appointed under the authority of said act of 1796 did run and mark, in 1799, the northern part of the western boundary of North Carolina, being the eastern boundary of the State of Tennessee, to a point on the north side of the Cataloochee turnpike, leaving the remainder of said line to the southern boundary of the States unmarked, but the necessity for a distinct location of said boundary line becoming evident, both States, by their respective General Assemblies, North Carolina in 1819 and Tennessee in 1820, made provision for the appointment of three Commissioners on the part of each State to settle, run, and mark the boundary line between the States "**agreeably to the true intent and meaning**" of said Cession Act of 1789; and, therefore, the Commissioners appointed by both States being charged with the specific duty of settling and running the boundary line "**agreeably to the true intent and meaning**" of said Cession Act, and having no authority to run, mark, or establish a line not described in said Cession Act, and endeavoring to run and mark said boundary line in accordance with the true intent and meaning of said Cession Act, ran and marked the line between the States from the Cataloochee turnpike to the

southern boundary of both States, and made and filed with each State a report of their survey, accompanying the same with a map, but if any "field-notes" were filed with said report, as alleged in the bill, defendant has no knowledge whatever in regard thereto, and proof of that allegation was demanded.

Rec., pp. 34-35, 46.

(3) That in 1821 both States, through their legislatures, passed acts confirming, approving, and ratifying the report made by said joint Commissioners. The confirmatory act by Tennessee, known as chapter 35 of the Acts of 1821, describes that part of the boundary line involved in this case as being "**on the summit of the Great Iron or Smoky Mountain**, and continuing southwestwardly on the **extreme height** thereof to where it strikes Tennessee River * * * **from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain** * * *; thence along the **extreme height** of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka turnpike road."

Rec., pp. 35-36.

The Tennessee confirmatory act is set out in the answer, and also appears in the appendix hereto, page 14.

(4) The North Carolina confirmatory act, after reciting, by way of preamble, that the boundary line **was run "agreeably to"** the Cession Act of 1789 and the Constitution of Tennessee, describes the boundary as run in terms identical with those of the Tennessee act, but the North Carolina act recites that the line run by the Commissioners was marked "with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile."

Rec., pp. 36-37.

(5) That while defendant understood there was some dispute in relation to parts of the boundary line southward from the Tennessee River by persons claiming land under grants from complainant westward of the true boundary line, nevertheless defendant did not know that complainant State of North Carolina claimed any of the territory west of the line defined by the Cession Act until the original bill in this cause was filed, and it would seem that when complainant filed her original bill she had not definitely determined how much of said boundary line she would dispute, because said original bill (paragraph 8, Rec., p. 7) avers that the dispute relates to that part of the line "between a point about a mile northeast of the Tennessee River and the junction of Big Fodderstack and the Hangover Leads, about nine miles southwest thereof," while the amended bill (paragraph 8, Rec., p. 29) alleges that that part of said line "between a point about a mile northeast of the Tennessee River and a point on Unaka turnpike road, as hereinbefore stated, about twenty miles southwest thereof, has become confused, uncertain, and the subject of contention," thus **extending the disputed zone** from the junction of the Big Fodderstack Lead with the Hangover Mountain, some ten or eleven miles southwestwardly to the Unaka turnpike road.

(6) That while complainant alleges that **from a point about one mile northeast** of the river the boundary line descends from the extreme height of the mountain (Rec., p. 5) to a point on the southwest bank of said river just west of the mouth of Slick Rock Creek, and runs thence up and from said creek to the Big Fodderstack, and thence with the main ridge thereof to its junction with the Hangover Ridge, yet complainant does not allege that said boundary line southwest from the junction of the Fodderstack and Hangover Leads, as run and marked by Commissioners in 1821, follows other than the extreme height of the mountain, which is agreeable to the Cession Act of 1789, and defendant avers that southwest of said junction, as well as northeast of said

nction, said boundary line does follow the main ridge of
ne mountain to the point where it is called Unaka Moun-
ain, and runs thence with the main ridge thereof to the
naka turnpike, and defendant averred that she was willing
hat the line should be so marked and established under the
rders of this court, and denied that the true boundary line
s or can be established agreeably to the Cession Act of 1789
t any other place than along the extreme height of the
nountain from the Tennessee River to the Unaka turnpike
oad.

Rec., pp. 37-38.

(7.) Defendant denied that the boundary line northeast
f the river crossed said river, as alleged in the bills, to a
oint "in the southwest bank thereof just west of the mouth
f the stream known as Slick Rock Creek," or that from such
oint on the southwest bank of said river said boundary line
follows said creek "about five miles," as alleged in the sev-
nth paragraph of the original bill (Printed Bill, p. 7, line
31), or "a short distance," as alleged in the sixth paragraph
of the amended bill (Printed Bill, p. 8, line 8), "to a ridge
leading up to the main ridge * * * known as Big
Fodderstack Mountain, and follows the main ridge thence
to the junction of the Big Fodderstack and Hangover leads."
Defendant avers that said description of this part of the
boundary line, as set out in complainant's bill, between said
point about a mile northeast of the Tennessee River and the
junction of the Hangover and Fodderstack ridges or leads, is
a clear departure from the description of said boundary line
as set out in the Cession Act of 1789, and as the same was
actually run and adopted by the Commissioners in 1821.
Defendant denied that the "Big Fodderstack lead" is either
the "extreme height" of the mountain called for in the Ces-
sion Act or the "main ridge" run by the Commissioners in
1821, and described in the confirmatory acts above set out,
and defendant avers that the Hangover ridge or lead ex-
tending from the Tennessee River southwestwardly to the

Stratton Bald and the point where the Fodderstack lead joins it, said Hangover ridge, but several hundred feet under its crest, is the extreme height of the mountain, according to said Cession Act, and the main ridge thereof run by the Commissioners in 1821, and referred to in the confirmatory acts of both States and in the report of the Commissioners hereinafter shown.

Rec., pp. 38-39.

(8.) Defendant averred that that part of the boundary line alleged by the original and amended bills to be uncertain and disputed is covered by that part of said line described in the Cession Act of 1789 as "along the **extreme height of said mountain** (that is, the Great Smoky) to a place where it is called Unicoi or 'Unaka' Mountain," and that part of said boundary line run and marked, in 1821, and described in said confirmatory acts, as well as the report of the Commissioners, in the following language, to-wit:

> "Running thence (from the stone on the north side of the Cataloochee Turnpike Road) on a southwestwardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River, * * * and crossing Tennessee River at the distance of sixty-five miles from the beginning, from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called Unicoi or Unaka Mountain, * * * thence along the extreme height of the Unicoi or Unaka Mountain to the southwest end thereof at the Unicoi or Unaka Turnpike Road."
>
> Rec., p. 39.

(9.) Defendant averred that until the original bill was filed she was not informed that there was any dispute whatsoever in relation to any part of the line **northeast of the Tennessee River**, and denied that there was any uncertainty in regard thereto, and averred that said boundary line north-

east of the river runs, and was so marked by the Commissioners in 1821, down the crest of the main ridge of the mountain, which gradually lowers, as it approaches the river, to a point on the bank of said river, about a half mile above the mouth of Slick Rock Creek, where a pine or hemlock tree was marked as a "fore and aft tree," which tree is still standing, and is recognized as a fore and aft boundary-line tree, bearing the marks placed thereon by the Commissioners in 1821, as described in the North Carolina confirmatory act and the report of the Commissioners; and defendant further averred that said boundary line, as described in the Cession Act of 1789 and run by said Commissioners in 1821, crossed **directly over the Tennessee River from said fore and aft tree to the crest of the main ridge of the mountain,** which is known as the Hangover ridge or lead, **opposite said marked fore and aft tree,** thence along the crest of said Hangover ridge or lead to said Stratton Bald and the junction of main or Hangover ridge with the Fodderstack ridge—the latter being several hundred feet lower than said main or Hangover ridge; and defendant filed as Exhibit A to its answer a map showing the undisputed marked State line several miles north of the Tennessee River, and reaching said river at a point where the said fore and aft tree is still standing, and also the line run and marked by the Commissioners in 1821 along the Hangover ridge.

Rec., pp. 39-40.
Exhibit A, p. 50.

(10.) Defendant denied the allegation of the bills that prior to 1892 she had never exercised jurisdiction over the land lying immediately west of the boundary line running from the Tennessee River along over the extreme height of the main ridge of the mountain to the Unaka Mountain, as claimed by her, and averred that immediately after the Indian title to said lands was extinguished, about the year 1836, she established a Surveyor's District, known as the

Ocoee District, and directed said lands to be surveyed and sectionized, and accordingly the Surveyor General for said district proceeded to survey out and sectionize said lands, including all of the lands around the headwaters of Tellico River practically up to the extreme height of the mountain or main ridge thereof, forming the boundary line between the States at that point, but for some reason said Surveyor General did not survey and sectionize the lands lying between Slick Rock Creek and the Hangover ridge. The precise reason for this omission was not known to defendant, but it may have been because this territory was at that time an almost impenetrable broken mountain basin or valley, explored only by Indians or outlaws, who, by tradition, had their retreat in its practically inaccessible fastnesses. That soon after the lands lying around the headwaters of Tellico River had been surveyed and sectionized under the act of her General Assembly passed in 1836 defendant began to issue and did issue, many grants to different persons for said lands, and in that way, and through her courts and taxing officers, had continued to claim and exercise jurisdiction over said lands and up to the boundary line which ran along the extreme height of the main mountain. Afterward, to wit, in 1854, defendant, recognizing that all of the lands to which the Indian title had been extinguished in 1836 had not been sectionized, as had been directed, passed an act providing for the issuance of grants upon said lands, and under said act the unsectionized land between Slick Rock Creek and Hangover Ridge became subject to entry and grant, but so wild and inaccessible was that territory that although a few people had penetrated it, not until 1882 or 1883 was the same entered in conformity with the laws of defendant; but in 1883 the lands lying west of the Hangover Ridge and between said ridge and Slick Rock Creek were entered in conformity with the laws of Tennessee by Samuel J. Griffiths and John H. Morton, and in 1886 a grant, No. 11091, was issued to them, which describes the

land covered thereby as beginning on a point on the Hangover Ridge a short distance from what is known as Hangover Rock, and running thence along the crest of said ridge to the Little Tennessee River, thence down said river and by various courses and distances back to the beginning, so as to include all of the lands in the Slick Rock Basin. Further, under an entry made in 1882, a grant was issued in 1892 by defendant to H. C. and T. E. H. McCroskey, which also covered the land lying between the crest of Hangover Ridge and Slick Rock Creek, and the lands so granted to the said Morton and Griffiths and the said McCroskeys were in the actual possession of their tenants, and were assessed by defendant for taxes, and the persons living thereon exercised by voting and otherwise the rights of citizens of Tennessee.

Rec., pp. 40-41.

(11) Further, defendant averred that the title to the lands covered by the McCroskey grant passed to one Charles Hebard, and his possession being interfered with by D. W. Belding and others, or their agents claiming the lands under grants alleged to have been issued by complainant, the said Hebard brought suit against said Belding and others in the Circuit Court of the United States at Knoxville, Tennessee, wherein the said Hebard, by bill in equity, exhibited his claim to and ownership of said lands based upon said McCroskey grant from defendant, and the defendants Belding and others answered, setting up their grants covering said lands issued by complainant, North Carolina; and in this cause much proof was taken by both parties, and the question of the location of the true boundary line by the said States was referred to a special master, whose finding was in favor of Hebard's claim under the Tennessee grant—that is, that the boundary line ran along the crest of the Hangover Ridge, and not from the mouth of Slick Rock Creek up said creek and the Fodderstack Ridge to its junction with the Hangover Ridge, as claimed by defendants Belding and

others; and said report of the special master was confirmed by the Circuit Court of the United States, which adjudged and decreed that that part of the boundary line between the States of Tennessee and North Carolina involved in that suit, and as run and located by the Commissioners of 1821, is as found by said special master, to wit:

> "Crossing Little Tennessee (formerly called the Tennessee) River at the point where it reaches the river on the northeast side and about a half mile above where Slick Rock Creek empties into said river; and from the river runs up the Hangover Ridge or Lead and along the extreme height of the same, passing the black or red oak, passing Slick Rock Gap, Cold Spring Knob, Big Fat Knob, Hangover Ridge Hao, Grassy Gap, and Stratton Bald, to a junction of the Hangover Ridge with the Fodderstack Ridge and all the lands lying west or northwest of said Hangover Ridge, including Slick Rock Basin, are in the State of Tennessee."

From the judgment and decree of said Circuit Court of the United States the said Belding and others prayed and were granted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, where, said cause coming on to be heard, the judgment and decree of the Circuit Court at Knoxville were in all things affirmed, as shown in the case of Belding *et al. vs.* Hebard, reported in 103 Fed. Rep., p. 532.

(12) Defendant also averred that Exhibit A to her answer in this cause (Rec., p. 50) is a substantial copy (reduced in scale) of the map Exhibit A to the deposition of W. D. Hale in said case of Belding *vs.* Hebard, showing the undisputed marked State line northeast of the river, the fore-and-aft tree on the river bank, and the Hangover Ridge or Lead with the marked State line trees thereon, which was adjudged and decreed to be the boundary line between the States under the Cession Act of 1789, and as run by the Commissioners of both States in 1821.

(13) That said Hangover Ridge had also been adjudged

to be the boundary line between defendant and complainant by the Chancery Court of Monroe County, Tenn., in a suit involving the validity of the Morton and Griffiths grant, above referred to.

Rec., p. 42.

(14) That defendant does not know what became of the report and map made by the Commissioners of 1821, and by them delivered to and filed with complainant, but it is true that the report and map made by said Commissioners and filed with defendant in 1821 did become mislaid for a long number of years, and were not found until the latter part of 1905 or 1906, when the same were discovered by her State archivist; and a certified copy of said report of the joint Commissioners, found by defendant's State archivist, is copied into the answer and cross-bill (Rec., pp. 43-44) and filed as Exhibit B thereto. The description of said boundary line as set out in said report is practically identical with that set out in the confirmatory acts of both States, above referred to, and describes the disputed boundary as follows:

> "From Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoi or Unaka Mountain," etc.
>
> Rec., pp. 43-44.

A certified copy of the map or plat found by defendant's State archivist is filed as Exhibit C (between pages 52 and 53 of the record) to defendant's answer and cross-bill.

(15) Defendant further averred that, said Commissioners' report and map coming to the knowledge of said Belding and others, defendants in said suit of Hebard *vs.* Belding, the said Belding, or his privies in estate, filed a bill of review in the Circuit Court of the United States at Knoxville, insisting that said map (Exhibit C to the answer and cross-bill) sustained their claim that the boundary line between the States ran up Slick Rock Creek, and praying that the

former decree adjudging that the boundary line ran directly across the river from the aforesaid fore-and-aft tree to and along the top of Hangover Ridge be set aside; but, upon answer being made to said bill and proof having been taken, it developed that just east of the Hangover Ridge was a creek or small river called "Cheoah," and upon the hearing the Circuit Court of the United States adjudged and decreed that said map did not sustain the contention of said Belding and others, but confirmed the contention of the said Hebard, claiming under Tennessee titles, and further adjudged and decreed that the former decrees in said case, to the effect that the boundary line was along the top of Hangover Ridge, were correct, and dismissed said bill of review. The court held that the creek just east of said boundary line marked on the map (Exhibit C to the answer and cross-bill) was Cheoah River or Creek.

Rec., pp. 44-45.

(16) Defendant further averred that said map (Exhibit "C") not only sustains her claim that the boundary line as run by the Commissioners in 1821 proceeded directly across the Tennessee River from the marked fore-and-aft tree to the Hangover Ridge, and thence along its crest, as hereinbefore shown, but also sustains and confirms defendant's claim that the true boundary line is east of the headwaters of the Tellico River, referred to in said report and the acts confirming the same, and that all the lands lying around the headwaters of the Tellico River belong to and are within the true and just boundaries of the State of Tennessee, notwithstanding a holding by the United States court at Knoxville in another case between contending claimants under grants from both States to the effect that said line, instead of running around the headwaters of said Tellico River, crossed the same; but defendant was not a party to said suit, nor is she bound thereby, and the same was decided before said map, Exhibit "C," was found, upon meager testimony not disclosing the facts in relation to said boundary line, and defendant again

avers that the extreme height of the mountain called for in said Cession Act is east of the lands lying around the headwaters of the Tellico River, and that said map, Exhibit "C," shows that said line was run by the Commissioners in 1821 so as to include all of said lands on the Tennessee side of said line, and was so run "agreeably" to said Cession Act.

Rec., p. 45.

(17) Defendant denied that the United States, through their executive, legislative, and judicial departments, have recognized the boundary line as contended for by complainant, and also denied that any topographical map in accordance with the claim of complainant had been made by actual survey and location on the grounds.

Rec., p. 46.

(18) Defendant denied all of the allegations of the bill adverse to the matters and claims set up by defendant in her answer, and called upon complainant to sustain the allegations of her bill by proof.

Rec., p. 46.

In order that defendant might have complete relief, she incorporated a cross-bill with her answer, and, after restating her claim that the boundary line northeast of the Tennessee River reached said river at the point shown by the marked fore-and-aft tree, averred that said line crossed said river directly from said fore-and-aft tree to the main ridge of the mountain, which at that place is known as the Hangover Ridge, and that said boundary line proceeds along the crest of said ridge, and was so marked by the Commissioners of 1821, for a distance of eight or ten miles, to a point where another ridge called the Big Fodderstack joins said Hangover Ridge, but which is several hundred feet beneath the crest of said Hangover Ridge, and that thence the line proceeding southwestwardly follows the extreme height

of said Great Smoky Mountain to where it is called the Unaka Mountain, and thence along the extreme height of said Unaka Mountain to Unaka turnpike road, and that all of the land and territory west of the said Unaka Mountain, including the lands west of Hangover Ridge and around Tellico River, belong to and are within the rightful boundary of defendant, and prayed for a decree so settling and determining said boundary line.

Rec., pp. 46-49.

Answer of North Carolina to Cross-bill of Tennessee.

Complainant, North Carolina, filed an answer to defendant's cross-bill reiterating the contentions set out in her original and amended bills.

Rec., pp. 55-61.

Replication.

A replication was duly filed by the State of Tennessee to said answer of complainant, North Carolina.

Rec., pp. 63-64.

Map Showing Contentions of Parties as Made by the Pleadings.

So that your honors may better understand the issues involved in this cause, defendant herewith submits a map, as Exhibit A hereto, showing the respective contentions of the parties as made in their pleadings.

The boundary line as claimed by Tennessee crossing the Tennessee River from the mountain on the northeast directly to the Hangover Ridge, and thence following the crest of the mountain around the headwaters of Tellico River and to the east thereof, and thence along the crest of said mountain to where it turns an almost due south course, crossing the Hiawassee River, is shown by a solid black line.

North Carolina contention, as made in the bills, to
et that at a point about **one mile northeast** of the Ten-
River the line **descends from the extreme height** of
ountain and runs to a point on the southwest bank of
er just west of the mouth of a stream known as Slick
Creek, is shown by the solid red line extending from
ountain on the northeast side of the river to the mouth
k Rock Creek, and the contention that the line then
p Slick Rock Creek to a ridge leading to the Fodder-
Mountain, and thence follows the Big Fodderstack
ain to its junction with the Hangover Mountain, is
by a broken or dotted red line.

North Carolina contention that instead of running
l the headwaters of Tellico River by way of the main
or watershed the boundary line runs along the top of
s called State Ridge, and after **crossing** the Tellico
runs up to the main ridge at a point called Jenks
is also shown by a broken or dotted line in red.

other parts of the boundary as claimed by Tennessee
own by the black line along the crest of the moun-
re undisputed.

marked fore-and-aft tree referred to in the answer
pp. 39, 41) as showing the point where the boundary
aches the river is designated by a circle and an arrow
ng thereto on the north bank of the Tennessee River.
l map, Exhibit A hereto, is practically a reproduction
t part of Exhibit No. 1 to Hale's deposition found in
inted record facing page 1141, which shows the con-
ns of the parties made in their pleadings.

Issues Made by the Pleadings.

Whether the line reported by the Commissioners of
and confirmed by both States follows the main ridge
Smoky Mountain to the fore-and-aft tree on the north
of the Tennessee River (as shown on Exhibit A hereto

and Exhibit A to defendant's answer, Rec., p. 50), and runs thence directly across said river to and along the main mountain called Hangover, and thence along the extreme height thereof around and to the east of the headwaters of Tellico River to the Unaka Mountain, as shown on said map, Exhibit A to this brief, crossing the Tennessee River and following the crest of the main ridge of the mountain from said river to the Unaka Mountain; or,

(2) Whether the line reported by said Commissioners and confirmed by both States descends, as claimed by complainant, from the extreme height of the mountain at a point about one mile northeast of the Tennessee River, and runs to a point on the southwest bank of said river just west of the mouth of Slick Rock Creek, as shown by the solid red line on Exhibit A to this brief, and from the mouth of Slick Rock Creek runs up said creek about five miles, as alleged in the original bill (Rec., pp. 5-6), or a short distance, as alleged in the amended bill (Rec., p. 27), to a ridge leading up to what is known as Big Fodderstack Mountain, and thence follows said Big Fodderstack Mountain to its junction with the Hangover Mountain, as shown by the broken or dotted red line southwest of the river following the meanders of said creek, and thence a ridge leading to Big Fodderstack, and thence along Big Fodderstack to a point called Junction; and,

(3) Whether, instead of following the extreme height of the main ridge and watershed around and to the east of the headwaters of Tellico River, the line reported and adopted by the Commissioners and confirmed by both States leaves said main ridge and watershed to the east and runs down what is known as State Ridge, crossing the Tellico River, thence to and up Jenks Ridge until it rejoins the main ridge and watershed at or near Jenks Knob, as shown by the dotted red line on said map, Exhibit A to this brief, crossing the Tellico River.

(4) Whether, if the Commissioners reported and adopted

the line according to the contention of complainant, such line is in accordance with the Cession Act of 1789, and if not in accordance with said Cession Act, whether the attempted ratification thereof by the States in 1821 has been confirmed by or consented to by the Congress of the United States.

It is Now Admitted that Boundary Line Reaches Tennessee River at the Marked Fore-and-aft Tree.

In stating the contentions of the parties and the issues made by the pleadings defendant pointed out that **complainant, by her original and amended bills, claimed that at a point about a mile northeast of the Tennessee River the boundary line descends from the extreme height of the mountain and runs to the mouth of Slick Rock Creek,** as shown by the solid red line on Exhibit A hereto; nevertheless we deem it proper to show at this place that complainant in her proof, as we understand it, now admits that the boundary line northeast of the river, instead of descending from the extreme height of the mountain at a point about a mile northeast of the river, **follows down the main ridge,** as claimed by Tennessee, **to the bank of the Tennessee River to a marked fore-and-aft tree** designated by circle on the northeast bank of said river and pointed to by the arrow on Exhibit A hereto, and then abruptly turns and follows down the north bank of said river about one-half mile, and there crosses said river to the mouth or just west of the mouth of Slick Rock Creek in the southwest bank of the river.

Complainant's Present Contention as to the Location of the Boundary Line is Comparatively Recent.

In view of the allegations of the bills that complainant has always claimed the boundary line to be according to the contention stated therein, it is proper at this place to call to the attention of your honors that said allegations are denied,

and it will be hereinafter shown that complainant's contention as made in the pleadings is comparatively recent, and but one of three or four distinct claims or contentions made by her officials claiming and exercising authority in relation to and the location of said boundary line.

Although a large mass of testimony was taken by both parties, the determinative facts are comparatively few, and their application to the respective contentions of the complainant and defendant can be best understood by bearing in mind the origin and history of the litigation between individuals claiming under grants from both States, which resulted in the institution of this suit, so that we will now first submit—

A Brief Review of the Litigation Growing Out of Complainant's Claim Along Slick Rock Creek.

As shown in defendant's answer (Rec., p. 41), one Hebard, claiming title under certain grants from the State of Tennessee, calling for the line along Hangover Mountain as the boundary line between the States, brought a suit in equity in the Circuit Court of the United States at Knoxville, Tennessee, to quiet his said title against Belding and others, claiming the same lands under grants from complainant, North Carolina. The determination of this suit depended upon the location of the true boundary line between the two States—Hebard claiming that the line ran along the crest of the Hangover ridge, as does Tennessee in this case, and Belding claiming that the line left the Tennessee River just below the mouth of Slick Rock Creek, and instead of running up Slick Rock Creek, ran up Slick Rock Ridge to a place called Stiff Knee, thence to the Little Fodderstack Ridge, and along that ridge to Big Fodderstack, and thence along Big Fodderstack to its junction with the Hangover Ridge, which Tennessee claims to be the main mountain. The line so claimed by Belding was considerably

north and west of the line up Slick Rock Creek, **and but recently before the institution of said suit had been surveyed and marked by stone monuments under the authority of the State of North Carolina.**

The testimony offered by Hebard in that case, which is offered in evidence in this suit, showed that **at least two trees along the Hangover Ridge bore State-line marks made in 1821.** It also developed after Belding had filed his answer setting up his claim as above stated, that for some little distance above the mouth of Slick Rock and along that creek there were a number of trees bearing State-line marks made in 1821, and then after an interval or space of some three miles no marked trees were to be found, but at a point on or near said creek, about five miles above its mouth, other trees bearing State-line marks made in 1821 were found leading up a ridge to Big Fodderstack. So that Belding abandoned his contention that the line between the States left the river below the mouth of Slick Rock, and ran up by way of Stiff Knee and Little Fodderstack to Big Fodderstack, and insisted that the line ran up Slick Rock.

It was also shown in the testimony in that case, which is made a part of the evidence in this case, that one of Belding's witnesses, a man by the name of Patton, had in 1867, coming from the west, followed a marked line to within three or four hundred yards of the head of Little Slick Rock Creek, and it also appeared in the testimony of W. D. Hale (Rec., p. 1161), a witness for Hebard, that there was a tree southwest of Big Fodderstack on the ridge known as Pine Mountain, leading down to Citico Creek, bearing State line marks of 1821—at a place where neither State claims the line to be.

Master's Report.

The special master found as a fact (Rec., p. 1377) that there were trees bearing State-line marks made about the year 1821 on the Hangover Ridge or Mountain, and that the

line along the Hangover Mountain, which he found to be the main mountain, conformed to the calls of the Cession Act, and also to the acts passed by North Carolina and Tennessee in 1821 confirming the report of the Commissioners, and that while there were more marked trees along Slick Rock Creek, that line was away from the natural objects called for in the Cession Act and the acts of both States passed in 1821, and was evidently run as a tentative line, and not adopted or reported by them.

The exhaustive opinion of the special master was offered in evidence in this cause, and is found in the printed record between pages 1375 and 1383.

Report of Master Confirmed by the Court.

The report of the special master was confirmed by the United States Circuit Court at Knoxville, Tennessee, and a decree entered in accordance therewith adjudging the true boundary line between the States to be in accordance with the claim of Hebard in that case and the contention of defendant in this suit.

In confirming the report of the special master the court, among other things, said:

> "It must not be forgotten, however, that the Commissioners in surveying and making the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest, where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the Commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had

no name whatever, nevertheless it would have been so natural and not necessary to avoid misleading for the Commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given it would be impossible to run the line as claimed by the defendants" (Belding *et al.*).

Rec., pp. 1384-5.

The decree of the Circuit Court of the United States at Knoxville was entered on June 10, 1899.

Rec., p. 1385.

Decree of Circuit Court Affirmed by Court of Appeals.

On appeal by Belding to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, the opinion and decree of the Circuit Court was affirmed by said Circuit Court of Appeals in an opinion rendered on July 13, 1900, by Judge Lurton, concurred in by Justice Taft and Justice Day, and found in the printed record in this cause between pages 1388 and 1403, and reported in 103 Federal Reporter, at page 532. This decision of the Circuit Court of Appeals seemed to settle all controversy in regard to the location of the true boundary line between the States immediately south of the Tennessee River, but in 1903 or 1904 the archivist of the State of Tennessee found the original report made by the joint Commissioners of both States in 1821, a copy of which is incorporated in defendant's answer (Rec., pp. 43-44), and also what purported to be the original plat or map referred to in said report, a copy of which map is made Exhibit C to defendant's answer in this cause and is found in the printed record facing page 52.

The original map or plat now in the possession of the State archivist of defendant will be submitted to the court on the hearing of this cause.

Some years after the decision of the United States Circuit Court of Appeals in the cause of Belding in Error *vs.* Hebard, one Hopkins, claiming to have purchased the Belding title, filed in the Circuit Court of the United States at Knoxville a bill of review predicated upon the claim that said plat or map of 1821 showed that the line reported by the Commissioners ran up or to the north and west of Slick Rock Creek, and that the stream designated as a "creek" and flowing into the Tennessee River on the southwest side, east of the boundary line, was Slick Rock Creek.

The contention of the parties claiming under Hebard was that said stream marked "creek" was Cheoah River, which flows into the Tennessee River on the south side, a short distance east of the boundary line. The evidence in this cause shows that a considerable amount of testimony was taken under the bill of review, and, while the opinion and decree of the United States Circuit Court at Knoxville on the bill of review are not made a part of the evidence in this cause, it is to be found reported under the style of Hopkins *et al. vs.* Hebard *et al.*, in 194 Fed. Rep., 301, wherein, among other things, the court found and held:

> "From the location of this stream marked creek on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River and not Slick Rock Creek."

The result of which was the dismissal of said bill of review by the U. S. Circuit Court at Knoxville. The bill of review case was appealed by Hopkins to the United States Circuit Court of Appeals at Cincinnati, where the decree of the Circuit Court was affirmed upon grounds perhaps not material to the issues involved in this cause.

The Institution of This Suit Brought About by Hopkins and Cozad under an Agreement with Complainant to Pay All the Fees of Special Counsel and the Costs of This Cause.

While the issues made by the bill of review in the United States Circuit Court at Knoxville were pending, the said Hopkins, in July, 1908, sold or gave an option upon the lands lying north and west of Hangover Mountain, and between that mountain and Slick Rock Creek, to his father-in-law, M. E. Cozad, and in March, 1909, a few months prior to the decision of the United States Circuit Court at Knoxville, in the bill of review case, Hopkins and Cozad induced the North Carolina authorities to institute this suit, upon giving bond to indemnify complainant against any cost incident to the suit, and agreeing to pay all costs and fees of special counsel.

It is fairly inferable from the testimony of Cozad that North Carolina had refused to bring this suit until said bond was executed by Hopkins and Cozad, and it is also fairly inferable from Cozad's testimony that his personal counsel, who happened to be a member of the North Carolina General Assembly, introduced the bill authorizing the institution of this suit.

M. E. Cozad, Rec., pp. 1533-1539.

If this were a suit between individuals, in the courts either of North Carolina or Tennessee, it would be dismissed for champerty and maintenance, because the purchase by Cozad from Hopkins of the latter's pretended title—Hopkins being out of possession—and the guarantee by Cozad and Hopkins of the cost and expense of this suit constitute champerty and maintenance under the common law and by the statute of 32 Henry VIII, chapter 9, prohibiting persons from buying or selling, or by any means obtaining, any pretended title to lands, etc., unless he who sells or his ancestor, or those from whom he claims, have been in possession of said lands

for a year prior to the making of such sale. This statute constitutes part of the common law of North Carolina and Tennessee.

And while it is not maintenance to purchase an interest in lands which are the subject-matter of a suit or controversy, nevertheless, if the vendee indemnifies the vendor against all the costs that may have been or may be incurred by the vendor in the prosecution of such suit, the transaction amounts to maintenance.

6 Cyc., 857.
Harrington *vs.* Long, 8 Myl. & K., 590.
Stephens *vs.* Bagwell, 57 Ves. Jr., 139.
Poe *vs.* Davis, 29 Ala., 676.
Keiper *vs.* Miller, 68 Fed., 627.
1 Hawk. P. C. (Curw. ed.), p. 470, sec. 1.
Green *vs.* Cumberland Coal & Coke Co., 110 Tenn., 38.

It is not our purpose in referring to the influences bringing about the institution of this suit, and the means provided for its prosecution, to suggest that complainant's suit should be dismissed on account thereof—if, indeed, that question could be made against the great State of North Carolina; and, moreover, defendant desires, and has filed her answer as a cross-bill for that purpose, to have the controverted question of boundary determined by this court; but we do respectfully submit that the facts above stated, showing the payment of all expenses by Hopkins and Cozad, and the further fact that two of the principal witnesses, to wit, D. B. Burns and S. S. Gannett, whose testimony is offered by complainant, were employed and paid as experts in this cause, affect their credibility as witnesses and destroy any idea of impartiality in the conclusions testified to by them.

In presenting the testimony bearing upon the respective contentions of the parties we shall first deal with the documentary evidence applicable to the whole line, and then

consider in their order the controverted point at Hangover and Slick Rock, and next the dispute at the Tellico River.

Salient Facts Applicable to Entire Line Sustaining Defendant's Contention, but Inconsistent with Complainant's Claim Shown.

1. By North Carolina Cession Act.

By the Cession Act of 1789 North Carolina fixed the boundary between herself and the territory ceded to the United States along that part of said boundary now in dispute on "**the extreme height**" of the Great Iron or Smoky Mountain, and provided that said extreme height should be followed to the Unaka Mountain.

Rec., pp. 3, 33.
Appendix, p. 6.

2. By Constitution of Tennessee.

In 1796, by an act of Congress passed on June 1, the territory ceded by North Carolina to the General Government was admitted into the Union as the State of Tennessee, with a constitution describing her eastern boundary in practically the same terms and language used in said Cession Act.

Appendix, p. 8.

3. By Complainant's Bill.

The bill admits that the boundary line between the States "**follows the main ridge or watershed of the Alleghany Mountain range,**" which include the Great Iron or Smoky Mountain and the Unaka or Unicoi Mountain.

Rec., p. 5.

4. By Legislative Acts.

(*a*) North Carolina by her act of 1796, the first act providing for a survey of her western boundary, provided that it should be surveyed and established "**agreeably to the true intent and meaning**" of said Cession Act.

Rec., p. 34.
Battles' Rev. Stat. N. C. (1837), pp. 93, 94.
Appendix, p. 10.

It is admitted that under this act the Commissioners only ran the northern half of the line southward or southwest to the Pigeon River and Cataloochee turnpike.

(*b*) The joint Commissioners who ran the boundary line in 1821 under the authority of the North Carolina act passed in 1819 and the Tennessee act passed in 1820 were directed to run said line "**agreeably to the true intent and meaning**" of said Cession Act.

Rec., pp. 34, 35.
Battles' Rev. Stat. of N. C., pp. 94, 95.
Appendix, p. 11.

5. By the Report of the Commissioners.

The report of the joint Commissioners recites that they ran and marked said boundary line as "**designated**" in the constitution of the State of Tennessee and said Cession Act, and that they proceeded along the **extreme height** of the Great Smoky Mountain to the Tennessee River, and then "from Tennessee River to the **main ridge** and along the extreme height of the same" to the Unaka Mountain.

Rec., pp. 43, 44.

The further fact appears from said report of the joint Commissioners that, so long as they were on the extreme height of the mountain, they were content to report that fact, and not until they left the extreme height of the moun-

in, being the locative and controlling call contained in said 'ession Act, did they make any reference to or give any ompass call showing a specific course and distance, **and then 'hen they crossed the Hiwassee River below the mouth of 'ane Creek** that fact was noted in said report.

Rec., p. 44.

6. By the Map of 1821.

That, whatever difference of opinion there may be in respect of course and distance, the map of 1821 admittedly hows that the line run, marked, and reported by the Commissioners was on the extreme height or crest of the mountain from the Pigeon River or Cataloochee turnpike to a point on the Unaka turnpike where it turns southward a traight line to the State of Georgia, unless it be immediately outh of the Tennessee River, where it is claimed by complainant that the line proceeds a short distance up a stream narked a creek, but even at that point it is admitted by S. S. Gannett, one of the chief experts of complainant, that he hachures or etching marks show that the line ran along ridge or bluff for a short distance and then on the main rest of the mountain.

Rec., pp. 477-478.

Copy of map of 1821, facing page 52 of record.

The original map to be shown to the court on the hearing hows more convincingly the facts above stated than any opy.

Said map of 1821 also shows the streams **crossed,** as called or in the report of the Commissioners—that is, Tennessee River and Hiwassee River—at the mouth of Cane Creek, nd in addition thereto shows another small stream unamed to have been crossed between the Hiwassee River nd the southern boundary of Georgia.

Said map of 1821 also shows the line as running around nd to the east of the headwaters of the Tellico River, as

claimed by defendant, and not a crossing of said river, as claimed by complainant.

7. North Carolina Map of 1837.

That in 1837 North Carolina, by an act of her General Assembly (Acts of N. C. of 1836 and 1837, ch. 9, p. 30), directed the lands lately acquired by her from the Cherokee Indians, which were just east of the boundary line involved here, to be surveyed, and directed the principal surveyor provided for in said act to make three correct maps of the surveyed lands, which were to constitute the county of Cherokee, in said State, and which maps were to show the boundary lines, water-courses, etc., one of which was directed to be filed in the office of the county court clerk of Macon County, N. C., one in the office of the Governor and the other in the office of the Secretary of State, along with the field-books of all surveys made pursuant to said act, and under the authority and direction of said act R. Deaver, as principal surveyor, made said survey and maps, one of which was filed in the office of the Secretary of State of North Carolina, and a copy thereof, duly certified by the Secretary of State of North Carolina, was offered in evidence by defendant, and is found in the printed record facing page 1576.

This map, made under the authority of North Carolina, shows that the boundary line between the States between the Tennessee River and the end of the Unaka Mountain runs on the crest of the mountain; that it begins on the south bank of the Tennessee River opposite the point where the State line on the north bank of the river reaches said river, and that it runs around and to the east of the headwaters of Tellico River, as contended by defendant, and does not cross the waters of Tellico River, as claimed by complainant.

8. The Marked Fore-and-aft Tree on the North Bank of the Tennessee River Pointing the Line Directly Across the River One-half Mile Above Slick Rock Creek.

While complainant's original and amended bills allege that the boundary line northeast of the river descends from the extreme height of the mountain about a mile from the river, and ran to the mouth of Slick Rock Creek, the evidence that a marked line ran down the crest of the mountain to a marked fore-and-aft tree on the bank of the river about one-half mile, or a fraction more, above the mouth of Slick Rock Creek is uncontradicted, and it is now admitted by complainant's witnesses that a line passing through the fore-and-aft tree, according to the direction of the marks thereon, would run directly across the river (Hyde, pp. 843-844; Slague, p. 766) and in the general direction of the Hangover Mountain and the black oak (blocked by Hale, and hereinafter referred to) on the Hangover Lead, and to the same effect is the admission forced from Burns (Rec., pp. 272, 273, 343), complainant's chief expert.

9. Hangover is the Main Mountain.

That the Hangover Mountain is the main mountain referred to in the report of the Commissioners and the confirmatory acts of both States passed in 1821, and so held by the master, the United States Circuit Court at Knoxville, Tennessee, and the United States Circuit Court of Appeals in the case of Belding *et al. vs.* Hebard (103 Fed., 532; Rec., p. 1394), and that it is the most prominent part of the south side of the river in view of any point on the boundary line north of the river within two or three miles of the river, is established by the testimony of Hale (Rec., pp. 1312, 1317, 1318, 1327) Wilson (Rec., pp. 1350, 1351), Muller (Rec., p. 1371), and Williams (Rec., p. 1411), and is admitted by complainant's witnesses Hyde (Rec., p. 844), Slagle (Rec., p. 765), and Gannett (Rec., pp. 461, 481,

482, 514), Gannett reluctantly admitting, under cross-examination, that the main ridge or mountain begins at Hangover, and that the nearest route to it is along the ridge beginning directly opposite the marked hemlock fore-and-aft tree on the north bank of the Tennessee River, where Tennessee claims, and is now admitted, that the boundary line reaches the river on its north side.

10. Marked Trees Showing State-line Marks Made in 1821 Along Hangover Ridge.

After Hale (Rec., pp. 1313, 1331, 1332), Wilson (Rec., p. 1347), and Muller (Rec., p. 1370) had testified in 1896 that there were trees along the Hangover Ridge and Mountain bearing very old State-line marks, and Belding had offered testimony to the effect that these marks did not seem old enough to have been made in 1821, Hale, in the summer of 1897 (Rec., pp. 1335-1336), blocked two of said trees—a black oak and a sourwood.

The black oak was marked for a fore-and-aft tree—two hacks above a blaze—and the block taken from this tree showed that the marks were made 76 years before—that is, in 1821 (Rec., p. 1336). The sourwood, in Sourwood Gap, blocked by Hale, was also marked as a fore-and-aft tree, and because it was hollow the rings could not be correctly counted, but the wood showed that the two hacks and the blaze were more than 61 years old.

Rec., pp. 1337-1338.

The block from both the oak and the one from the sourwood were exhibited with Hale's deposition, and submitted to scrutiny and inspection of Belding's witnesses and to the court in the case of Hebard *vs.* Belding, and it was found and held by the special master, the United States Circuit Court at Knoxville, and the United States Circuit Court of Appeals at Cincinnati, that these trees bore State-line marks

ade, those on the oak certainly, and those on the sourwood obably, in 1821.

Rec., pp. 1377, 1397.

Opposed to this convincing evidence there is the mere inion evidence of Burns, Gannett and others, who do not etend to have seen the trees before they were blocked or e **blocks of wood** taken from the trees and made part of e evidence in Hebard *vs.* Belding, and whose opinion is erely a part, as we shall hereinafter show, of the argument ey were employed to make some thirteen or fourteen years ter the trees had been blocked.

So defendant confidently insists that the line running own the mountain on the northeast side of the river, and ointing through the marked fore-and-aft tree directly ross the river, and thence running along the Hangover idge or lead to the Hangover or main mountain, and thence y way of Hao and Stratton Bald westward, conforms to—

(1) The Cession Act of 1789 and the constitution of Tennessee, calling for a line "along the extreme height of" the Great Iron or Smoky Mountain.

(2) The directions given to the Commissioners of both States in the acts under which they were appointed—that is that they should run the line "agreeably to the true intent and meaning of" said Cession Act.

(3) The report of said joint Commissioners, showing that they had run "the dividing line as designated" in the constitution of Tennessee and said Cession Act, and that it ran "from Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoi or Unaka Mountain."

(4) To the confirmatory acts passed by both States in 1821, adopting the language used by the Commissioners in their report.

(5) To the map of 1821, showing a line on the crest of the mountain, and that from the north bank of the Tennessee River it passed directly across said river to a ridge or bluff, and thence on to the main mountain.

(6) To the official survey and map made in 1837 under the authority and express direction of the North Carolina act of 1837, which said survey and map shows that at a point on the south bank of the Tennessee River immediately opposite where the boundary line reached it on the north side, said boundary line leaves the river on the crest of a ridge or mountain and runs with the mountain and the divide of the waters around and to the east of the headwaters of Tellico River to the end of Unaka Mountain.

The Effect of the Call "from Tennessee River to the Main Ridge," Contained in the Report of the Commissioners and the Confirmatory Acts of 1821.

Defendant submits that not only does the line along Hangover Ridge conform to the requirements of the Cession Act and the Constitution of Tennessee and to the report of the Commissioners and the confirmatory acts of 1821, but as a matter of law said call, in the absence of proof showing a definite location **legally** adopted elsewhere, fixes said line along the most direct course from the Tennessee River to the main or Hangover Ridge. It is well settled that the order of applying descriptions of boundaries is, first, to natural objects, then to course, and then to distance, and as said in Brown *vs.* Huger, 21 How., 306, 318:

> "In ascertaining the boundaries of surveys or patents, the universal rule is this: That whenever natural or permanent objects are embraced in the calls of either, they have absolute control and both course and distance must yield to their influence."

This court, in Northern Pacific Railway Co. *vs.* U. S., 227 U. S., 355-360, in construing the meaning of the term "the main ridge" of a mountain used in an Indian treaty, said:

> "We cannot assume a plurality of main ridges and that the treaty meant to distinguish one from the others. **The main ridge necessarily had a definite and conspicuous individuality and needed no identification.**"

The definite and conspicuous individuality of Hangover as the main ridge is established in this cause, so that the description of this part of the boundary as contained in the report of the Commissioners and the confirmatory acts of both States means a line run from the Tennessee River direct to the main ridge, which is Hangover. In discussing this precise point, in the case of Belding *vs.* Hebard, 103 Fed. Rep., 532, that eminent jurist, Judge Lurton, deeply versed in the law relating to lands and boundaries, said (p. 542):

> "The description of the boundary as run and marked by the Commissioners calls for a course from one natural object, the Tennessee River, to another, the Unaka Mountain. In the absence of any further description, the line should be run straight from one monument to the other. 3 Washb. Real Prop., side p. 632; Burnett *vs.* Jones, 51 N. C., 210; Jenks *vs.* Morgan, 6 Gray, 448; Caraway *vs.* Chancey, 51 N. C., 364. The first call in the boundary act of both States is 'from the Tennessee River to the main ridge.' There are no words of intermediate description. The line should, therefore, be a straight one from the last monument on the river, the fore-and-aft pine tree, to the 'main ridge.' There being no possible doubt as to the identity of the 'main ridge' referred to, there can be no doubt on the face of the description following that the line should then run 'along the extreme height of the same' to the next natural monument, to-wit, 'to the place where it is called the "Unicoy" or "Unaka" Mountain.' Finding, as we do, upon the line thus located by identified natural objects, two old State-line marked trees, marked, as shown by block-

ing and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the Commissioners in 1821, was the Hangover line, as found by the special master, and as claimed by appellees."

The lines up Slick Rock Creek and the one CROSSING the Tellico River, now claimed by complainant, are departures not only from the extreme height of the mountain called for in the Cession Act of 1789, but also the locative call "from Tennessee River to the main ridge along the extreme height of the same to a place where it is called the Unicoi or Unaka Mountain," contained in the report of the Commissioners and the confirmatory acts of 1821.

Complainant, as we understand, practically concedes that her claim of line up Slick Rock Creek does not conform to "the extreme height" of the mountain called for in the Cession Act, or the usual construction of the locative description "from Tennessee River to the main mountain," called for in the report of the Commissioners and the confirmatory acts of 1821, and that the line claimed by her running **across** the Tellico River is a departure from the locative description "along the extreme height" of the main ridge to the place where it is called Unicoi or Unaka Mountain, contained in said report and confirmatory acts, and she attempts to justify or legalize these departures from said Cession Act, report and confirmatory acts, by reputation that the line is at the places claimed by her, by marked trees along those lines, by the survey of the Ocoee District in Tennessee, stopping at Slick Rock Creek, by inference and argument drawn from the map of 1821, and perhaps in other ways, all of which will be noted hereinafter.

The contentions and questions of fact involving the line at Slick Rock and the line **across** the Tellico River are to some extent different and will be discussed separately.

SLICK ROCK.

North Carolina's contention that she has always claimed that the boundary line runs from a point on the south bank of the Tennessee River just west of the mouth of Slick Rock Creek and follows said creek about five miles to a ridge leading to the summit of the Big Fodderstack Mountain, and that "general reputation has always located the line along said creek," is not sustained by the facts.

As to the "general reputation" relied on by complainant as pointing to the location of the boundary line, it is sufficient to observe, as the proof shows, that this so-called "reputation" has shifted with the interest of individual claimants, and has pointed to lines on Little Fodderstack and along Stiff Knee to the river, and from Slick Rock Creek about a mile and a quarter above the mouth of Slick Rock, thence along a ridge to Little Fodderstack, and to other places more frequently, according to the interest of the parties, than to the so-called line up Slick Rock Creek for a distance of five miles.

Further, it is to be noted that while in her original bill (Rec., pp. 5-6) North Carolina solemnly avers that she has always claimed the line to be from a point on the southwest bank of the Tennessee River just west of the mouth of Slick Rock Creek and following said creek to a point about five miles to a ridge, yet in her amended bill (Rec., p. 27) she changes said averment carrying the line five miles up Slick Rock Creek into an averment that said line "follows the creek a short distance," thus showing at least some uncertainty as to what she did claim, even on Slick Rock Creek.

Map Showing Some of the Different Contentions o Complainant.

To illustrate some of the different contentions of co plainant (showing **departures** from the Cession Act) as the location of the boundary line southwest of the Tennes River, in the neighborhood of Slick Rock Creek, Tennes herewith submits a map, as Exhibit B to this brief, show the different principal contentions by complainant, refer to in the evidence, and their departure from defendant's sistence as to the true location of the boundary line.

The solid black line following the crest of the mount from the point marked 59th-mile tree, crossing the Tennes River at the fore-and-aft tree designated by the point of arrow, and running thence along the Hangover Ridge a following the extreme height of the main ridge around headwaters of Tellico River, and to the east thereof, to end of Unaka Mountain, thence a southerly course, cross the Hiwassee River to the Georgia line, represents Tenn see's claim as to the true location of the boundary line.

North Carolina's **earliest** contention, as shown by the pro as to the location of the line between the States immediat southwest of the Tennessee River, is shown on said Exhi B by the dotted green line, beginning on the south bank the river a short distance below the mouth of Slick Ro Creek, thence running up a ridge by way of the point cal Stiff Knee, and thence following a continuation of the dot green line along the Little Fodderstack Ridge to where joins the Big Fodderstack Ridge, and thence as shown the dotted red line along the Fodderstack Ridge to the po marked on said map as "Junction." **This is the line s veyed by McLelland under the authority of the Gene Assembly of North Carolina, as will be hereinafter sho**

Another "traditional" line called for in North Carol grants begins at the mouth of Slick Rock Creek and ru thence with said creek about a mile and a quarter to its ju

MAPS TOO LARGE FOR FILMING

vith Little Slick Rock Creek, as shown by the dotted
n red on Exhibit B, and from said junction follows
is known as Fork Ridge, running from the mouth of
Slick Rock Creek, as shown by the dotted line in
v on Exhibit B to the Little Fodderstack, and thence
that ridge, as shown by the dotted lines in green, to
'odderstack, and thence along that ridge, as shown by
otted lines in yellow, to the point designated on Ex-
B as "Junction."

ll another location of the boundary line between the
is to be found in an old North Carolina grant, No.
offered in evidence by complainant (which, however,
ot included in her order for printing the record, Rec.,
), is indicated on Exhibit B hereto by the solid green
unning from the south bank of the river at the mouth
ck Rock Creek, south 25 east to the Hangover Ridge.
A. C. Williams' Dep., Rec., p. 992.

mplainant's present claim as to the location of the
dary line along Slick Rock Creek and the ridge lead-
o Big Fodderstack, and thence following that ridge to
oint called "Junction," is shown by the dotted red line
xhibit B.

The Evidence Relating to McLelland's Line.

this place in our brief we shall not go into a detailed
nent of the facts as they bear on the controversy at the
o River, but point out generally how and the authority
r which the McLelland line was run and its relation to
ontroversy in the Slick Rock territory.

will be hereinafter more specifically shown, as early as
, Tennessee had granted a large part of the lands on
eadwaters of Tellico River to Francis Lea (Rec., pp.
-1075), and certainly from as early as 1875 down to
or 1892, North Carolina had issued a number of grants
n the disputed territory to one Mercer Fain (Rec., pp.

100-112). So that in the early 90's controversies arose between the Stevensons, privies in title to the Tennessee grantee, Lea, and the Fains, in regard to said lands on the headwaters of Tellico, with the result, as shown by the testimony of Ben Posey, Esq., one of the special counsel for complainant in this cause, that a resolution was passed by the General Assembly of North Carolina in 1893, while Mr. Posey was a member of the State Senate, authorizing the Governor of North Carolina to have a survey made locating the boundary line between the Tennessee River and the Hiwassee River, or as stated by Mr. Posey, the turnpike road at the end of the Unaka Mountain. And acting under the authority of said resolution the Governor employed Mr. Posey and authorized him to secure a competent surveyor and have said line located—in consequence of which authorization Mr. Posey employed John R. McLelland, who made the survey and the report thereof, which he delivered to Mr. Posey and was by him filed with the Governor of North Carolina.

Rec., pp. 1083-4.

When the proof developed these facts, the State of Tennessee immediately served notice on North Carolina to produce for examination the report of the survey made by said McLelland.

Rec., p. 1084.

Said report has never been produced.

McLelland was offered as a witness by complainant, and when he was first examined at Murphy, N. C., in the absence of the Attorney General of Tennessee, it was endeavored to be shown by him that defendant, through her Attorney General, had summoned him as a witness to Knoxville (Rec., p. 583), where, after a conference, defendant had discharged him, said McLelland, without placing him on the witness stand; whereupon, Mc-

McLelland was recalled for further cross-examination by the Attorney General of the defendant, when it was clearly shown that the purpose for which McLelland was summoned to Knoxville was to secure from him a copy of the report of his survey, and when it was discovered that he did not have a copy of said survey he was allowed to go or discharged from further attendance by defendant's Attorney General.

Rec., pp. 585, 589-590.

McLelland testified that under his employment by Mr. Posey, the agent of complainant, he began his survey at the Unaka turnpike road, an undisputed point on the boundary line, at the end of Unaka Mountain, and where said line turns southwardly toward the Georgia line, and that he ran northeastwardly along the Unaka Mountain to Jenks Knob, where, in company with one of the Fains, he left the main ridge of the mountain and went down what is known as Jenks Ridge, **crossed** the Tellico River, and thence along the State Ridge to where it joined the the main ridge on the mountain—as shown on Exhibit B hereto by the dotted line in red crossing the Tellico River; that thence he followed the main ridge of the mountain to the point on Exhibit B hereto, marked "Junction," and that there he followed those with him down **the side** of the main mountain to the Hangover ridge, as indicated by the dotted red line on Exhibit B to the Little Fodderstack ridge, and along that ridge as indicated by the dotted green line to Stiff Knee, and from Stiff Knee down a ridge as indicated by the dotted green line to a point on the south bank of the Tennessee River, some little distance below the mouth of Slick Rock.

McLelland testified that he marked the line surveyed by him by mile stones as follows: At the end of the first mile from the Unaka turnpike there was cut on one side of the mile stone erected there the figures "100" and "1," which indicated that the stone was 100 miles from the Cataloochee

turnpike and 1 mile from the Unaka turnpike. At the end of the second mile the figures cut on the stone were "99" and "2," indicating 99 miles from the Cataloochee turnpike and 2 miles from the Unaka turnpike, and so on the numbers increased from 1 and decreased from 100 until on the stone erected at the end of the last full mile about two-thirds of a mile from the Tennessee River the stone was marked on one side 62, indicating that it was 62 miles from the Cataloochee turnpike, and on the other side 39, which indicated that said stone was **39 miles from where he began on the Unaka turnpike.** He testified that his survey was accurate.

Rec., pp. 578-580, 585-588.

McLelland said in substance that when he arrived at the point on Exhibit B hereto, called "Junction," that is, where the Fodderstack ridge joins the main mountain—in order to reach Fodderstack ridge it was necessary to go down **the side of the main ridge** four or five hundred feet before reaching Fodderstack ridge, **and that the Fodderstack ridge "does not look as though it were the leading ridge at that point."**

Rec., pp. 579-580.

It is to be noted that the stone marked by McLelland as 33 miles from the Unaka turnpike and 68 miles from the Cataloochee turnpike, is only about one-half mile north of Big Fodderstack, and at a point called Big Stack Gap, as shown on Exhibit B hereto. The last stone marked by McLelland, showing 39 miles from Unaka turnpike and 62 miles from the Cataloochee turnpike is shown by the red circle or dot in the broken green line running on a ridge from the Tennessee River below the mouth of Slick Rock in the direction of Stiff Knee.

These mile stones on McLelland's survey, as well as other stones along that survey, identified by the evidence and the relevancy of the distances represented by said stones to complainant's contention, will be hereinafter further noticed.

he "Traditional" Line Up Little Slick Rock Creek to Little Fodderstack.

In 1897, H. S. Hayes, a North Carolina surveyor, witness or Belding in the case of Hebard *vs.* Belding, in the United tates Circuit Court at Knoxville, testified that there was **a traditional understanding in our State** (meaning North arolina) **that the line went up that ridge**"—that is, Fork idge—from the mouth of Little Slick Rock Creek up to ittle Fodderstack Ridge, as shown by the yellow line on xhibit B hereto. This "traditional" line was also adverted o by Hyde, another North Carolina surveyor, testifying for elding in the litigation involving the disputed territory in lebard *vs.* Belding in the United States Circuit Court at noxville, and this witness shows that Belding claimed in he Slick Rock basin even up to Little Fodderstack.

Rec., pp. 830-842.

D. B. Burns, chief expert for complainant in this cause, dmits that there were North Carolina grants calling for a tate line on Little Fodderstack, or to the west thereof, nd that he was told by his employer, Cozad, and by a surveyor by the name of Denton, in the employ of Hopkins nd Cozad, that the State line ran up Little Slick Rock reek to Little Fodderstack, and thence along Little Fodderack to Big Fodderstack Ridge.

Rec., p. 297.

Maps of the Ocoee District in Tennessee.

Because the survey of the Ocoee land district in Tenessee in its northeast corner stopped at and did not extend eyond Slick Rock Creek, is insisted upon as evidence or n admission by Tennessee that the line between the States uns along that creek.

It is to be borne in mind that prior to 1836 the lands

4s

on both sides of the controverted boundary line belonged to and were in the possession of the Cherokee Indians, and in 1836 said Indians ceded their said lands to the United States. In October, 1836, the General Assembly of Tennessee, by what is known as chapter 2 of the Acts of 1836-1837, entitled "An act to provide for the survey of lands ceded to the United States by the Cherokee Nation of Indians within the State of Tennessee by the treaty of May 23, 1835," Tennessee created out of said lands what is known as the Ocoee District, and directed the surveyor general of that district to survey said lands and plat them off into townships and sections. The Surveyor General, shown by the proof to have been John B. Tipton, did make a survey and filed a plat of said lands. The plat shows that he stopped his survey at Slick Rock Creek. (See map facing page 88 of the printed record; also map, Exhibit No. 1 to the deposition of Charles Seymour, facing page 1044 of the printed record.)

The map facing page 88 of the printed record covers only a part of the northeast corner of the Ocoee District; and in regard to Exhibit No. 1 to Seymour's deposition, it is proper to call to the attention of your honors that the mountain range indicated thereon, both north and south of the river, is no part of the official map of the Ocoee District, but was platted on a copy thereof many years ago by an old surveyor by the name of Hoyt, as will be hereinafter shown.

However, while it does not bear on the controversy at Slick Rock, said map Exhibit 1 to Seymour's deposition shows that the Surveyor General of the Ocoee District, in making his survey and plat, surveyed and platted, laying off into ranges, townships and sections, the lands around the headwaters of the Tellico River within the disputed zone, and east of complainant's claim in this case.

The Ocoee map, as applied to the lands around the headwaters of Tellico River, is platted into Exhibits A and B hereto, and is also shown platted into Exhibit No. 1 to the deposition of W. D. Hale, facing page 1144 of the printed record.

We call to the attention of your honors that the copy of that part of the official map of the Ocoee District running up to Slick Rock merely shows that the section lines do not extend beyond said creek, **and there is no statement upon that map that Slick Rock Creek is the boundary line between the States.** The significance of the absence of any such statement on said map showing Slick Rock Creek as the extent of the survey becomes manifest when your honors examine the certified copy of that part of the official map showing the disputed territory around the headwaters of Tellico, which is filed as Exhibit No. 6 to the deposition of W. D. Hale, facing page 1158 of the printed record, and on which "N. Carolina" was written, showing North Carolina just beyond the survey as made.

The result of stopping the survey at Slick Rock Creek was to leave a strip of the Cherokee lands lying between said creek and Hangover, some three miles wide and eight or ten miles long, unplatted and unsectionized; these are the lands in dispute in this cause between Slick Rock and Hangover. Not until 1854 was there a law in Tennessee under which **unplatted** Ocoee lands could be granted.

However, in 1854, by chapter 22 of the acts of that year, Tennessee provided that all or any of the vacant lands in the Ocoee district may be entered by a general entry in the entry taker's office in the said district at Cleveland, **whether the same be designated on the map of said district or not.**

It is not improbable that the failure of the Surveyor General to survey and plat the land east of Slick Rock Creek resulted in some rumor or reputation of said creek as the State line, although it is conceded that neither on the plat nor any report made by said Surveyor General is said creek referred to as the State line. Some deeds of mesne conveyance from the original grantees of lands bordering on Slick Rock Creek do refer to said creek as the State line, but we submit that this sort of evidence is not sufficient to drag the boundary line from the "**extreme height**" of the main

mountain, three miles to the west, and from 500 to 3,000 feet below the extreme height, down in the gorge of this creek.

There is proof by complainant, and also by defendant, as to why the Commissioners stopped at Slick Rock Creek.

Complainant offers evidence through C. C. Jones (Rec., p. 883) to the effect that he was told by one Thomas Hensley, long since dead, that he was with the surveyors part of the time when they were surveying the eastern line of the Ocoee district, and that they stopped at Slick Rock Creek because it was the straight line. Jones does not pretend that Hensley had any official connection with the survey of the Ocoee district.

It is established that John B. Tipton was the Surveyor General of the Ocoee district, and that with him, as his assistants, among others, was T. G. Harvey, a resident of Monroe County, Tennessee, and who lived until 1895, and that he told Col. T. E. H. McCroskey that "the Hangover Lead was the State line, but the surveyors, when they got to Slick Rock Creek, stopped there because the lands lying east of the creek were very rough and steep, and they were worn out with and tired of the work."

Rec., p. 1361.

W. D. Hale testified that he knew Mr. Harvey very well; that he had a number of conversations with him in regard to the Ocoee Land District; that Harvey was a chain-man on the original survey, and made statements to him (Hale) similar to those testified to by Colonel McCroskey. The statement of Harvey to Hale, as testified to by the latter, is as follows:

> "He told me they were very tired and worn out, and that the ground east of Slick Rock Creek was so steep and rough they abandoned the survey, and didn't regard the creek or the limit of their survey as the State line, but regarded the ridge east of the Slick Rock Creek as the State line."
>
> Rec., p. 1339.

Taking into consideration the nature of the Slick Rock gorge, rough beyond description (Rec., p. 162), and that at this time there was nothing cheaper in Tennessee than mountain lands, the practicably impenetrable and inaccessible character of the land between Slick Rock and the Hangover ridge, give not only a color of probability, but the stamp of truth, to Harvey's statements to both Hale and McCroskey.

Further, that Tennessee came to know that all of the Indian lands comprised within her borders and acquired in 1836 had not been surveyed and mapped and platted as part of the Ocoee district, is manifest from the passage of said act of 1854, providing that **all** or **any** of the vacant lands in said district may be entered, **whether the same be designated on the map of said district or not.**

Rules Governing the Admissibility of "Reputation Evidence" to Establish a Controverted Boundary.

Before considering the so-called "reputation evidence" in detail, it is proper to note the limitations under which such evidence is admissible.

As held by Judge Lurton in Hebard *vs.* Belding, 103 Fed., 532, "reputation evidence," as to the location of ancient corners and boundaries, is held to be admissible in evidence by the courts of Tennessee; but it is to be noted that such evidence must show and relate to the **reputation,** which has grown up and been established in regard to such location, and that testimony amounting merely to a declaration of an individual having no connection with the establishment of the boundary is not admissible.

However, the declaration of an owner **while in possession** as to the location of his lines is admissible in a subsequent controversy.

Davis *vs.* Jones (Tenn.), 3 Heil, 603.

And certainly it must appear that the declarant had knowledge of the boundary spoken of before testimony as to his declaration would be admissible in a subsequent suit.

1 Wigmore, section 1568.

Further, Mr. Wigmore, in volume 1, section 1584, says: "What is offered must be in effect a **reputation,** not a mere assertion of an **individual.**"

In Draper *vs.* Stanley (Tenn.), 1 Heisk., 433, the principle announced by Mr. Wigmore is likewise recognized by the Supreme Court of Tennessee. In this case the declarant, whose declaration it was sought to establish by testimony after his death, did not appear to have been the surveyor establishing the boundary, or that he was present when it was established, or that it was pointed out to him by any person whose declaration would be competent under the law, and the declaration was excluded as not "falling within the rule for proving boundary **by reputation.**"

In Holland *vs.* Overton (Tenn.), 4 Yerg., 468, cited by Judge Lurton in Hebard *vs.* Belding, *supra*, the testimony tended to establish **reputation,** not merely the declaration of some one not connected with the establishment of the boundary or the owner, or one having special knowledge in relation thereto.

Applying these principles to the "reputation" testimony offered by both complainant and defendant, it will be seen that but very little of said testimony is competent. However, we set out the substance of said testimony for the examination of the court under the principles above stated.

North Carolina's Reputation Evidence of Line at Slick Rock.

N. G. Phillips:

Phillips testified that before the war he heard his uncle, Thomas C. Tatham, then a very old man, and who claimed to have been with the Commissioners when the line was run

in 1821, say that the line was run up Slick Rock Creek to a ridge; that he did not remember whether it was Big Fodderstack or Little Fodderstack; that this statement by his uncle was made not only to Capt. Steve Whitaker, but also to Mr. Pearcy, who was the County Surveyor of Cherokee County (Rec., pp. 156-158). That he had also heard a man by the name of Patton say that the line went up Slick Rock Creek (Rec., p. 159).

Patton claimed to have had some entries on Slick Rock Creek (Rec., pp. 158-159).

This testimony as to the declaration of Tatham amounts to nothing more than a line was run up Slick Rock Creek somewhere, and it may be true that a tentative line was run in the neighborhood of Slick Rock Creek, because, as will be hereinafter referred to, there are some marked trees on Slick Rock Creek near the river, and also on the ridge leaving said creek about five miles from the river, but it is admitted that there is a space of three miles along said creek between the location of the marked trees where, although the timber is abundant, there are no marked trees showing State-line marks.

Aside from Phillips' statement that Tatham had said a line ran up Slick Rock Creek, the material part of his testimony is that Whitaker and Patton had entries on Slick Rock Creek, but that must be a mistake, because complainant, in collating entries and grants in that locality to sustain her contention, does not mention an entry or grant either to Whitaker or Patton.

Rec., p. 76.

But the most significant part of Phillips' testimony is his statement that when the county of Graham was established in the early 70's he was appointed by the Legislature of North Carolina to run the lines of Graham County (Rec., p. 160), and he states that in doing so he ran "from the

mouth of Slick Rock Creek on the **east** side," and when asked how high up Slick Rock Creek he ran, he said:

"**I went until Slick Rock Creek gave out on the left hand prong,** and then I took up the ridge."

This survey by no means conforms to the present claim of North Carolina, in that following the creek and its left-hand prong to where they gave out would carry him to the neighborhood of Hangover Mountain or Cold Spring Knob on the Hangover Ridge or Lead. (See Exhibit No. 1 to Hale's Dep., facing p. 1144; Exhibit to Burns' Dep., facing p. 257 of printed record.)

This is unquestionably true if he did follow the left-hand prong of Slick Rock Creek, but if he followed the ridge between Little Slick Rock Creek and Big Slick Rock, as he seems to indicate on cross-examination (Rec., pp. 163-4), he must have gone up the ridge next to Little Slick Rock, indicated by their yellow line on Exhibit B hereto—that is, the traditional line, as testified to by Hayes (Rec., p. 804).

William Jenkins:

The testimony of this witness is something wonderful. He states that he heard a man by the name of Foster tell his father that he was along when the State line was run, and that it crossed the mouth of Slick Rock Creek and ran about as complainant now claims.

Rec., p. 166.

This witness was examined in June, 1910 (Rec., p. 165), and in explaining his acquaintance with Foster he says that he was "acquainted with him two days," and saw him at other times (Rec., p. 165); that he last heard of Foster about thirty or thirty-five years ago, and it is evident that this was when Foster was leaving North Carolina and going to Tennessee, as claimed by Jenkins, who says that at this

time Foster looked like he was about sixty years old (Rec., p. 166).

Giving Jenkins the benefit of the maximum of thirty-five years since he had heard from Foster would carry back from 1910, the day on which he was testifying, to 1875, and if Foster was sixty years old at that time he must have been born in 1815, and therefore could have been only six years old at the time the line was surveyed by the Commissioners in 1821, and we submit that he was rather young to have traversed that line with the Commissioners.

David Hyde:

This witness also testified that he heard Tatham say that a line was run up Slick Rock to the main top of Fodderstack, and, wonderful to relate, Hyde says that Tatham told him and Phillips that the Commissioners "named that Fodderstack."

Rec., pp. 170-171.

N. F. Cooper:

This witness testified that he had heard Dr. Patton and Dr. Lyle and a man by the name of Turnbill say in 1854 that the State line crossed the Tennessee River at the mouth of Slick Rock where there was a fore-and-aft tree—a **beech**—that it then ran up Slick Rock Creek.

Rec., p. 172.

Rope Twister Conseene:

This witness, a Cherokee Indian, examined in June, 1910, said that he was 78 years old, thus showing his birth to have been in 1832; but he testified that he was old enough to carry a pack when the Indians were removed to the west of the Mississippi River, which, as this court knows, was about 1836.

He testified that his father, who died a short time before

the close of the Civil War, showed him where the line between the States ran, and, while he says it was on "yon side" of Slick Rock Creek, nevertheless he explains that it began at the mouth of Slick Rock Creek and ran "on the **sunny side** or south side * * * went on to the Smoky Mountain and went to a thicket that they couldn't get through and they hung up a flag there, and as they went on they set up a rock about three feet high * * * that after getting to the thicket they could not get through; they came back to the mouth of Slick Rock Creek and went on the line toward Georgia."

The significant thing about the testimony of this Indian is his statement that they ran on the sunny side—that is, the south side—of Slick Rock and went on to Smoky Mountain; and he further states that from the mouth of the creek it ran "up the sunny or south side of the hill all the way up," which unquestionably would put the line on Hangover ridge, because that is the ridge or hill or mountain on the sunny or south side of Slick Rock Creek.

Rec., pp. 175-6.

There are other statements by this witness, but they cannot be reconciled with his definite and positive testimony that the line ran on the sunny or south side of Slick Rock Creek all the way up.

William Williams:

This witness testifies that he heard several old men say that the line was run up Slick Rock (Rec., p. 179). One notable thing about his testimony is that one of these old men, Mike Harrison, told him that he got a letter from an old surveyor saying that the line went up Slick Rock Creek; "that it was rough and they made the line up that way" (Rec., pp. 181-2). Certainly a strange reason for locating a line.

mes Williams:

James Williams was also offered as a witness to show putation of a line somewhere in the neighborhood of ick Rock Creek, but it is to be noted that he claims to ve received his information to some extent from his ther, who had entered some land on Slick Rock Creek, and at his father told him that the line "was the ridge near e mouth of Slick Rock Creek," which is evidently the ridge nning up by Little Slick Rock, as shown by the yellow ne on Exhibit B to this brief.

Rec., p. 186.

. P. Taylor:

This witness claims that he heard Tatham tell one idcon Morris that the line ran "**off of Smoky Mountain own opposite the mouth of Slick Rock Creek.**"

Rec., p. 187.

This testimony coincides with the claim of North Caro-na as made in the bill that the line descends from the nountain on the northeast side of the river, but that is now ut of the way, because North Carolina admits that the line un straight down to the river at the marked fore-and-aft ree.

. E. Grant:

This witness, testifying in 1910, states that between wenty and thirty years before that he had heard some old nen claim that the line ran up Slick Rock Creek, but it is not pretended that any of these men from whom Grant claims to have received his information had any personal knowledge of the running of the line.

Rec., pp. 191-195.

E. W. Harrison:

The testimony of Harrison, who is the son of the Mike Harrison referred to in William Williams' testimony, *supra*, is to the effect that his father claimed that the line ran up Slick Rock to the Fodderstack, as did others named by him, who, however, had no personal knowledge of the location of the line.

Rec., pp. 196-197.

Other witnesses were offered by complainant, to wit, Dave Orr (Rec., p. 863), Samuel Sneed, J. S. Maroney and Samuel Henry (Rec., p. 866), Dr. J. W. Patton (Rec., p. 868), James McDaniel (Rec., p. 870), John Dockery (Rec., p. 872), M. L. Brittain (Rec., p. 876), and others (Rec., pp. 877-882), who testified to some sort of an understanding or reputation—much of it recent, some of it running back forty or fifty years—to the effect that the line ran up Slick Rock, but where it left Slick Rock many of them were uncertain.

However, it is proper to note the testimony of Mr. Brittain (Rec., p. 876), who claimed that the North Carolina surveyor, Pearcy, told him that the State line crossed the river at the mouth of Slick Rock; that the occasion for his inquiry of Pearcy was he (Brittain) wanted to make an entry; **but the result of his conversation with Pearcy was that Brittain located his entry up the river between Slick Rock Creek and the mouth of Cheoee River** (Rec., pp. 876-877). Complainant makes no mention (Rec., p. 86) of an entry or grant to Brittain on Slick Rock or affecting the boundary line, **so it is fairly inferable that Mr. Brittain, to be sure that his entry was in North Carolina, did not file a location within the disputed territory.**

W. P. Chambers:

Complainant offered the testimony of this witness, and, among other things, sought to establish by him declarations

as to the State line being up Slick Rock Creek, and also that the Governor of Tennessee had refused, between 1882 and 1892, to issue grants for lands east of said creek. To show how untrustworthy this witness is, and that the Governor of Tennessee did not refuse to issue the McCroskey grant, the entry for which was made in July, 1883 (Rec., p. 1232), which Hale shows covers the disputed territory at Slick Rock, it is only necessary to point out that in 1886 the State of Tennessee, through Governor Bate, issued to Morton and Griffiths a grant, No. 41091, for lands which covers this disputed territory, as shown by Hale, east of Slick Rock Creek.

Rec., pp. 1156-1157, 1233-1234.

Further, this is the same W. P. Chambers who, when examined in the case of Mary L. Morton *vs.* Olney Dotson, in the chancery court of Monroe County, Tennessee, on November 28, 1908, located for complainant in that suit said Morton and Griffiths grant **as running along the Hangover Mountain, with the boundary line between Tennessee and North Carolina** as claimed by Tennessee in this case, to a point on said Hangover Ridge immediately opposite the marked and admitted fore-and-aft tree on the north bank of the Tennessee River.

Rec., pp. 1651-1657.

We submit that the testimony of Chambers adverse to Tennessee in this cause is entitled to but little credit.

Some Tennessee Reputation Evidence Showing Line on Hangover Ridge.

James Farr:

This witness was examined in 1896 in the cause of Hebard *vs.* Belding; said that he had not only lived on the headwaters of Little Slick Rock Creek, but in the territory that is now disputed to the east of the main Slick Rock Creek;

that he voted in Monroe County, and that the Hangover Lead was understood to be the State line.

Rec., p. 1352.

Emerson Debity:

This witness, examined in 1896 in Hebard *vs.* Belding, testified that he was a son of John Debity, and with his father lived on the east side of the main Slick Rock Creek—that is, within the territory now in dispute; that he and his father lived there from 17 to 20 years previous to 1896; that they voted in the Mulberry precinct in Monroe County, that it was the understanding that the line ran along the Hangover Ridge east of Slick Rock Creek.

Rec., p. 1352.

John Debity:

This witness was also examined in 1896, and testified that at that time he had lived on the land in dispute in this cause 18 years; that he had always claimed to be in Tennessee; that his understanding was that the line between North Carolina and Tennessee was the Hangover Lead; that he voted at Mulberry precinct in Monroe County, and paid taxes in Tennessee.

Rec., p. 1355.

He states that on one occasion he went over in North Carolina to vote, but they would not allow him to vote unless he would swear that he lived in North Carolina, and that he would not do.

Rec., p. 1355.

Boyd McMurray:

This witness, examined in 1898 in Hebard *vs.* Belding, and 71 years of age at the time he testified, said that he was a large land-owner and farmer about 15 miles from the State line in controversy, and that he had lived and owned

his land there for thirty years. He states that Jack Milligan and Isaac Carringer, both of whom were very old men, told him in 1867 that the line ran along the Hangover Ridge east of and beyond Slick Rock. He stated that all the men who lived on the east side of Hangover Ridge voted and paid taxes in Tennessee.

Rec., p. 59.

McMurray also testified that Belding, the defendant in Hebard *vs.* Belding, told him that the entire Slick Rock Basin was located in North Carolina (Rec., p. 1359).

Mr. McMurray also stated that he knew a surveyor by the name of Hoyt very well; that he was an old man and the best surveyor he ever knew; that many years before the date McMurray was testifying, Hoyt was surveying the Wetmore lands (shown by red squares on Exhibit No. 1 to the deposition of Charles Seymour, facing page 1044 in the printed record); that Hoyt was surveying six months or more in the mountains, and that Hoyt told him that he had located the State line on the Hangover Ridge; that he found a pine tree marked at the edge of the water on the north side of the river; that he then crossed the river and went up the main divide and found a sourwood plainly marked on the Hangover Lead, and that in his opinion there was no doubt but that the line ran along the Hangover Ridge.

Rec., p. 1359.

McMurray further testified:

> "Gov. Wetmore and Hoyt were both at my house and I heard Gov. Wetmore instructing Hoyt about locating the State line, and he told him to go north of the river and back four or five miles and first locate the State line on the north side of the river, and then to cross over and locate it on this side. It was after this that he told me of having located the State line on the main divide or Hangover Ridge. Hoyt told me that he found marks up and down Slick Rock Creek but that it was a 'bogus' line. He

also said that he found a line north of the river running through Mr. E. J. Sanford's land which he said was a 'bogus' line also, while Hoyt was at my house he surveyed and platted my lands. Mr. Hoyt is now dead. Gov. Wetmore lives in Rhode Island and owns mountain lands in this county.

"Q. 9. Have you any interest in the location of the State line?

"A. No, sir."

Rec., pp. 1359-1360.

This survey by Hoyt and conversation between him and McMurray was long before any controversy developed, or any litigation was instituted in respect of the location of the true boundary of the State. Nor was Governor Wetmore interested in lands which nowhere touched the Hangover Mountain, but was interested in lands around the headwaters of the Tellico River, which lands at that place did reach the State line, as claimed by Tennessee.

James L. Nelson:

James L. Nelson, 77 years old when he testified in this cause in November, 1910, then living in Monroe County, Tenn., but formerly living in Cherokee, N. C., was well acquainted with Wm. H. Thomas, a prominent North Carolinian, prior to the war, and who made a great many entries of land in Cherokee County, and Nelson testified that Thomas told him that he had entered two tracts of land beginning on the State line near the mouth of Slick Rock Creek, and he directed him to have these lands surveyed by Pearcy, the County Surveyor; that Thomas and Pearcy went down in that neighborhood and Thomas told Nelson, the witness, that the line between the States was the Hangover Ridge, that is, the ridge between Slick Rock Creek west of the ridge and Bear Creek east of the ridge. Thomas told Nelson that the line ran from a point about a half mile above the mouth of Slick Rock Creek, then to Slick Rock Gap, and thence along the Hangover Ridge.

Rec., pp. 938-939.

Nelson testified that he had known that country for 50 years, long before he had left North Carolina, and that it was the general understanding among the older citizens that the line ran along the Hangover ridge.

Rec., pp. 940-941.

Among other citizens that Nelson named on cross-examination, who had told him that the line was along the Hangover ridge, was Dick Stratton (Rec., p. 945), who, the proof in this case shows, lived, died, and was buried on the undisputed line a few miles west of Hangover and the Stratton Bald (John Stratton, pp. 1035).

Pleas Henry:

This witness, 54 years old in 1910, living at the mouth of Abrams Creek in Blount County, a few miles distant from the disputed point, testifying that he was acquainted with the Slick Rock country, and had heard from many old men living up in that neighborhood, Atlas Crowder, living between Big and Little Fodderstack, and Jack Milligan, living in the neighborhood of Tallassee Ford, and others told him that the line was along the Hangover Ridge. He says that the first claim that he ever heard to the effect that the line was elsewhere than along Hangover was by Belding, who produced as his evidence a geological map showing that the line ran from the top of Fodderstack.

Rec., pp. 949-950.

Henry testified that David Orr, living at the foot of the mountain on the east side, and who was the agent of the Thomas heirs, told him that the line ran to the top of the Hangover lead (Rec., p. 951).

Henry also testified that a man by the name of Joe Woody was convicted in the United States Court at Knoxville for operating an illicit distillery at the old John Debity

place, east of Slick Rock, and between Slick Rock and Hangover ridge.

Rec., pp. 962-3.

Milton Williams:

This witness was 58 years old when he was examined in 1910; had lived in Monroe County about 18 years, and prior to that time had lived in the Yellow Creek Township of Graham County, North Carolina, which adjoins Hangover—lived practically in sight of Hangover until he moved to Monroe County, and had never heard the Hangover line disputed until the trouble grew up recently.

Rec., pp. 964-5.

The State line along Hangover had often times been pointed out to him when he was a boy by his grandfather and an old man by the name of Deaver, both of whom were Revolutionary soldiers and very old men—that one time when he was a small boy with his grandfather and an old man by the name of Carr at the turnpike road on the north side of the river these old men talking with each other pointed out the line down the north side of the river and over at Hangover—from the point where they were on the north side of the river the ridge from Hangover down to the river was plainly visible.

Rec., pp. 965-967.

Wm. R. Carringer:

This witness, 57 years old in 1910, when he was examined, now lives in Blount County, Tennessee, but formerly lived in Graham County, N. C. He testified that he had it from his father when a very old man, and from others all his life, that the State line ran along the Slick Rock Gap or Hangover Ridge.

Rec., pp. 981-2.

A. C. Williams:

This witness, 54 years old when he was examined in 1910, and a citizen and resident of Graham County, N. C., testified that he had been one of the agents of the Thomas heirs (Rec., p. 991), and that it was generally understood in Graham County that the line along Hangover was the line between the States (Rec., p. 996). That he had held the office of school commissioner and road overseer in Graham County, and that he had been advised by the county authorities that he could not enumerate the children west of Hangover ridge for school services, or require road duty of people living west of said ridge (Rec., pp. 997-8).

Robert Grant:

This witness is a citizen of Graham County, N. C.; had been road overseer in Graham County and was notified by the county authorities that his road orders did not extend west of Slick Rock Gap, which is on the Hangover lead.
Rec., p. 1028.

Marked Trees Along Slick Rock Creek.

The principal evidence, as we understand, relied upon by North Carolina to pull the boundary line away from the extreme height of the main mountain, as called for in the Cession Act, the report of the Commissioners and the confirmatory acts of both States relates to a number of marked trees between the mouth of Slick Rock Creek and the mouth of Little Slick Rock, a distance of perhaps a mile and a quarter, and a number of marked trees on the ridge leading away from Slick Rock Creek, about five miles from its mouth, in the direction of Big Fodderstack, and other trees along the Big Fodderstack Ridge toward the point called Junction.

These trees in clusters are indicated upon the map filed as an exhibit to the deposition of D. B. Burns, facing page

257 of the printed record, along the route or line at present claimed by North Carolina from the south bank of the Tennessee River to the point called Junction.

It is admitted that **for a distance of about three and one-half miles** and between the mouth of Little Slick Rock Creek and the point where the present claim of North Carolina leaves the creek toward Big Fodderstack there are no marked trees.

Rec., pp. 276, 278.

While it is also admitted that along this creek are all kinds of marks—some recent and many apparently aged—some indicating corners or lines of private claimants, and many seeming to have been made at random or for a purpose not now ascertainable, nevertheless the evidence does show that a number of these trees bear State-line marks—either as side-line or fore-and-aft trees, which the blocking indicates may have been made in 1821, **but defendant insists that even if said trees were marked in 1821 complainant wholly fails to establish that said line was adopted and reported by the Commissioners in 1821 as the true boundary between the States.**

It will be helpful to a clear understanding of this branch of the case to set briefly before your honors the substance of the testimony showing how and when these marked trees began to be relied upon by complainant, and those claiming under her, as indicating the boundary line between the States.

It is to be borne in mind that in 1893 McLelland, under the authority and by the direction of North Carolina, ran and reported the line between the States as passing from Big Fodderstack Ridge down Little Fodderstack, thence by way of Stiff Knee along a ridge to the Tennessee River, a short distance below the mouth of Slick Rock, and that, when Hebard instituted his suit against Belding and others in the Circuit Court of the United States at Knoxville, Belding set up claim to the whole Slick Rock basin, insisting that the

line between the States ran either conformably to that reported by McLelland or up what his surveyor, Hayes, referred to (Rec., p. 804) as the "traditional" line, running from the mouth of Little Slick Rock up to the Little Fodderstack Ridge, thence along that ridge to Big Fodderstack, thence southeast to the main mountain.

The Hayes Survey.

After W. D. Hale, the county surveyor of Monroe County, had testified in Belding *vs.* Hebard (his evidence being incorporated in this record) and filed a map showing the Slick Rock basin, the Hangover Mountain, the Fodderstack Ridge, and the ridge leading by way of Stiff Knee down to the river, a copy of which on a reduced scale is filed as Exhibit A to defendant's answer and cross-bill in this case, and had also submitted his field-notes to the inspection of Belding's counsel and experts, and had testified to having found one or more marked trees on a ridge leading from Big Fodderstack down toward Slick Rock, said map and field-notes were turned over to two of Belding's experts, H. S. Hayes and J. C. M. Bogle, and, although Hayes testifies that his instructions were to use all his energies "to locate the State line" (Rec., p. 794), he admits (Rec., p. 804) that before he began his survey he had made up his mind "to some extent" that the line ran up Slick Rock Creek, and thereupon he and Bogle, without any investigation whatsoever of the line on the north side of the river, went directly to the mouth of Slick Rock Creek, and between the mouth of said creek and the mouth of Little Slick Rock Creek he found 12 marked trees (Rec., pp. 798-799), all of which bore side-line marks, and some of which were on the west side of the creek, while others were on the east side, and some of the side-line marks were facing the creek, while others were away from the creek (Rec., pp. 805-6), and he admits that from tree No. 12, which was about three-quarters of a mile below the mouth of Little Slick Rock (Rec., p. 806-809),

for three miles and 228 poles—that is, to a point about five miles above the mouth of the creek—he found no marked trees whatsoever.

Bogle's testimony substantially agrees with that of Hayes.

This arbitrary election by Hayes and Bogle of the mouth of Slick Rock Creek as being on the State line in that territory, without any previous examination on the ground, was the first step taken by claimants under North Carolina to establish the boundary line up that creek, and it is manifest that Hayes and Bogle as well as those coming after them were but following out the instructions of and endeavoring to build up a case for their employers.

In his direct examination there was read to Hayes a part of section 61 of the Code of Tennessee, and he was asked whether the line run by him and Bogle "answers the description of said section as a line running 'from Tennessee River to the main ridge.'" He answered, "I think that it does, sir; while you might have gone up the other lead and answered the description too."

Rec., p. 803.

On cross-examination, however, he admitted that it would have been much easier for the Commissioners in 1821, in locating the State line, to have gone up the Hangover Lead to the Hangover Mountain, and that it would have been more natural for them to follow the Hangover Ridge from the river than to have gone up the creek.

Rec., p. 807.

He was then asked this question:

> "If the State line coming from the northeast strikes the river at one-half mile or more above Slick Rock Creek, would it not still be more natural to follow up the ridge leading to Hangover?
>
> "A. Yes, sir."
>
> Rec., pp. 807-8.

Section 61 of the Code of Tennessee describes the State line in the language of the Commissioners' report of 1821 and the confirmatory acts hereinbefore referred to, and only a part of that section had been read to Hayes; when he gave the answer last above referred to the whole section was read to Hayes and he was asked:

> "From your experience as a surveyor, if they had run up Slick Rock Creek some six miles or more, why would they have not said 'up the creek,' instead of saying 'thence to the main ridge.'
>
> "A. **I think I would have noted it in running up that creek, had I been the surveyor.**"
>
> Rec., p. 808.

There was exhibited with Hayes' deposition what purported to be a map of the Gilbert and Peet survey (Rec., p. 810), but we submit that even a cursory examination of that survey and the natural objects there called for show its inaccuracy, and that it is not to be relied on as sustaining complainant's contention in this case.

Bogle, who was with Hayes in the employ of Belding, on cross-examination also admitted that it would have been easier to have followed up the Hangover Lead to reach the main mountain than to have gone by way of Slick Rock Creek.

Rec., p. 821.

The Hyde Survey.

Whether the act, found in the printed record at page 783, was passed by the General Assembly of North Carolina in 1897 to aid Belding in his litigation does not appear, although it is manifest that H. P. Hyde, county surveyor of Graham County, had some connection with it, and it is further manifest (Rec., p. 845) that his survey was in accordance with the contention of Belding, and that if Hyde was not in his employment at the time he was shortly thereafter.

Rec., p. 826.

At the time said act of 1897 was passed the litigation between Hebard and Belding had been proceeding for some time, and by the terms of said act the county surveyor of Graham and Cherokee counties, who happened to be H. P. Hyde and one Lovingood, were authorized and directed to "survey and locate the boundary line between said counties and the State of Tennessee to the top of Tennessee Bald Mountain," and they were directed "**to run said line according to the calls set out in the act of the General Assembly of North Carolina at its session of 1821**, being chapter 41 of said acts, and entitled 'An act to confirm the boundary line between this State and the State of Tennessee.'" And it was further provided (Rec., p. 783) that "**the said surveyors shall follow the calls contained in said chapter** and mark and distinctly locate said line, and hereafter in all the courts of this State and for every purpose whatever the line as located and marked by said surveyors shall be the true line between North Carolina and Tennessee."

Hyde states that when he went to make the survey under the authority of said act he was of the opinion, from reading land papers and the North Carolina act of 1821, that "the State line ran up the **ridge** between Little Slick Rock and Slick Rock" (Rec., p. 830), but he admits (Rec., p. 831) that he knew that Hayes and Bogle had run a line up Slick Rock Creek, and that they claimed the boundary line was along said creek, and certain it is that, notwithstanding he was directed to "follow the calls" of the North Carolina act of 1821, which called for a line "from Tennessee River to the main ridge," nevertheless he went directly to the mouth of Slick Rock Creek, and followed Hayes and Bogle's survey up that creek about five miles, thence to Big Fodderstack Ridge (Rec., p. 825). He says he began at the mouth of Slick Rock Creek, although no one directed him to do so, and when pressed he reluctantly **admitted that if he had run according to the calls of the act of 1821 from the marked fore-and-aft tree on the north bank of the Tennessee River,**

opposite the Hangover Ridge, he would have gone the most direct way or line to the main ridge—that is, Hangover (Rec., pp. 844-845).

He gave the testimony just referred to on his second examination, and after he had made a trip to the north side of the river (which he had not done prior to his first examination), when he there found and blocked that hemlock fore-and-aft tree on the north bank of the Tennessee River, about one-half mile above the mouth of Slick Rock, and found that it had been marked in 1821.

Rec., pp. 833-4.

Now, during his first examination, and before he had been to this fore-and-aft tree, which had been testified to by Hale, Wilson, and Muller, he stated:

> "If the Commissioners, in locating the Tennessee line, ran down river one-half mile to mouth of Slick Rock, and thence up Slick Rock Creek five miles, I cannot explain why they did not note it. If I had been running the line and struck any stream, I would have mentioned it."
>
> Rec., p. 831.

Further, he admitted that if the boundary line continued southwardly across the river in the direction "that said fore-and-aft tree was marked," it would have gone in the general direction of Hangover Lead and the black oak thereon blocked by Hale, and found to have been marked as a State line tree in 1821.

Rec., p. 843.

In the matter of marked trees along Slick Rock Creek and the ridge leading up to Big Fodderstack and the Big Fodderstack Ridge, the testimony of Burns and Gannett, whose relation to this case will be hereinafter discussed, contains nothing new, their claim to having found a number of trees that had escaped the eyes of such old woodsmen as

Bogle, Hayes, and Hyde **being merely cumulative.** These additional trees, with those previously testified to by Hayes, Hyde, and Bogle, are noted on the map exhibited with Burns' deposition between pages 256 and 257 in the printed record.

Evidence of Other Trees Bearing State-line Marks Far to the West of the North Carolina Contention.

The evidence shows that on the ridge leaving Slick Rock Creek, about five miles above its mouth, and leading up the Big Fodderstack along the line now claimed by North Carolina, was an old trail which passed on from Big Fodderstack down to Citico Creek. When Hale was examined in the case of Hebard *vs.* Belding, he testified, in substance, and repeated his testimony when examined in this case, that when he was examining all of the ridges in that locality for trees bearing State line marks, a tree on Pine Mountain, two or more miles west of Big Fodderstack, was pointed out to him by one William Debity as bearing State line marks. This tree was on the ridge and trail leading from Big Fodderstack down to Citico Creek, and was a fore-and-aft tree, being marked with two hacks and a blaze, and upon blocking it he found that the marks were made in 1821 (Rec., p. 1161). This is the tree on Pine Ridge or Mountain referred to by Judge Lurton in his opinion in the case of Hebard *vs.* Belding. Hale testified that between the tree he blocked and Fodderstack Mountain, along that same ridge and trail, he saw two or three other trees which had the outward appearance of having been marked about the same time.

Rec., p. 1161.

The location of the tree blocked by Hale on Pine Mountain, some two miles west from Big Fodderstack, is shown on Exhibit B to this brief.

Marked trees were also found on the Fodderstack Ridge **northeast** of the spur by which complainant's contention reaches said Fodderstack Ridge.

Rec., p. 1377.

The Map of 1821.

Both complainant and defendant rely on this map as sustaining their respective contentions.

Complainant insists that the stream marked "Creek" on the southwest side of the Tennessee River where the boundary line crosses that river, and just west of what appears on the map to be a mountain, running parallel to the general course of the Tennessee River, is Slick Rock Creek, up which, for a distance of five and a half miles from its mouth, the boundary line runs.

Defendant insists that the map shows that the boundary line crosses the river at practically right angles, and immediately goes on to a ridge, and thence a direct course to the main mountain, and that the stream marked "Creek" is Cheoah River or Creek, which lies about a mile immediately east of the Hangover Ridge, and between which and the Tennessee River runs a mountain range or ridge practically parallel both to the river and to the creek.

History of the Map.

The report of the Commissioners refers to plats made in duplicate accompanying said report (Rec., p. 52).

Complainant claims that both the report and plat filed with her have been lost or destroyed, and cannot now be produced.

It will be noticed that the report, a copy of which is introduced in evidence in this cause (Rec., pp. 51-52), is addressed to Joseph McMinn, Governor of Tennessee, and the only evidence extant that said report was filed with Governor McMinn is to be found in brief references thereto in two

messages of Governor McMinn to the General Assembly of Tennessee in September, 1821. On September 17th, Governor McMinn, in his message, said:

> "With our mother State on the east there is also much reason to hope that the question of boundary is in a train of definite settlement. General Stokes, Col. Mebane and Col. Love have been appointed by Governor Franklin to act on the part of North Carolina, and Col. Smith, Col. Allen and Major Perry are Commissioners on the part of this State. These Commissioners met at Newport on the 17th day of July last, and as they will have had time sufficient to complete the duties assigned them, I have it fully in expectation that I shall be enabled to transmit their report, together with that from Kentucky, for your consideration and approval."
>
> Senate and House Journal of 1821, p. 25.

On September 22, 1821, Governor McMinn, addressing the Senate and House of Representatives, said:

> "In conformity with the promise in my communication of the 17th, sundry documents therein referred to are herewith transmitted.
>
> "The joint report of the surveyors who had run and marked Walker's line, between the States of Kentucky and Tennessee is marked A.
>
> "The **joint report** of the Commissioners who have superintended the running and marking the boundary line between North Carolina and Tennessee is marked B."
>
> Senate and House Journal of 1821, pp. 50-51.

The matters referred to in the remainder of Governor McMinn's message have no bearing on the questions involved in this case.

It is to be noted that Governor McMinn, while referring to "the joint report of the Commissioners," which is marked "B," makes no reference in express terms to any map or plat having been filed.

From the date of this message down to 1903 or 1904, ex-

cept for the reference to the report contained in the confirmatory acts of both States, there is no evidence whatsoever of the existence or whereabouts of either the report or any map accompanying said report.

However, in the year 1903 or 1904, Mr. Robert T. Quarles, State archivist of Tennessee, in endeavoring to arrange and classify old official records and documents, found in the basement of the Capitol at Nashville in a barrel containing waste or other unimportant papers what purported to be the original report, signed by all of the Commissioners named by Governor McMinn, and also found an old map purporting to be signed by all of the Commissioners and also by Robert Armstrong, surveyor on the part of Tennessee, and William Davenport, surveyor on the part of North Carolina.

Both the original report and map will be produced by defendant on the hearing of this cause.

There are a number of so-called certified copies of said map in this record—the first copy being exhibited with the answer and cross-bill, facing page 52 of the printed record. The next copy found in the record was offered by complainant North Carolina and is found facing pages 264 and 265 of the printed record, and in connection with this last exhibit we desire to call to the attention of the court that the figures 86 opposite a circle in the boundary line, where it runs around and to the eastward of the headwaters of Tellico River, are not on the original map, nor are several lines appearing on this exhibit, to be hereinafter further referred to.

It is to be noted that neither in said report nor on said map is there any reference whatsoever to the field-notes of the surveyors Armstrong and Davenport, nor is there any evidence whatsoever in this record that the field-notes of the surveyors accompanied said report and map, or were ever filed with the governors or any other official of either of the States.

Defendant's insistence, established, as we submit, by the proof, is that this map of 1821, made hurriedly, as is contended by complainant, was only intended to portray the

general route of the line run by the Commissioners in accordance with the Cession Act on the extreme height of the main ridge to Smoky Mountain to where it is called Unicoi Mountain, and the streams crossed or touched by the line run by the Commissioners, together with general topographical conditions along said boundary line; and that it is no sure guide as to either the course or distances run by said Commissioners, and that the courses and distances supposed to be described by the short lines or tangents and circles on said map cannot be platted so as to identify and run any particular line or ridge found along the undisputed part of said boundary.

Moreover, the supposed courses indicated by the short lines on said map, as well as by the long line at the southwest end running from Unicoi Mountain to the Georgia line, are not in accord with the North and South points of said map, as indicated by the figure at the left or northeast end thereof. The evidence sustaining these propositions will be hereinafter set out, but before doing so we invite your honors to—

A Brief Comparison of the Report and Map of 1821.

The Commissioners' Report (Rec., pp. 51-52) states that they ran the line "**designated**" in the Constitution of Tennessee and in the Cession Act of North Carolina, and in so doing north of the Tennessee River followed the same and the Great Iron or Smoky Mountain—the extreme height thereof to where it strikes the Tennessee River, and that from Tennessee River they ran to the main ridge and along the extreme height of the same to the place where it is called the Unicoi or Unaka Mountain, and thence along the extreme height of said mountain to the end thereof at the Unaka turnpike road.

The etching or hachures along the boundary line shown on the map, it is conceded, show a line marked on the extreme height of the mountain from the Catalooche turnpike

to the Tennessee River, and that it crossed the river at almost right angles to the southwest bank, and then along a ridge or bluff near to and west of a stream it went directly to the main mountain, and thence along the extreme height thereof to the Unicoi turnpike road at the end of Unicoi Mountain.

The report of the Commissioners does not call for crossing the Tellico River, and the map of 1821 shows a line around the headwaters of Tellico River on the extreme height of the mountain and the divide of the waters, which is in accord with the description contained in said report.

The report does not call for crossing the Tennessee River at the mouth of any stream, and the hachures and etching on said map of 1821 show the line on a ridge or bluff directly across the river from said line, reaching the river on the northeast side. The report (Rec., p. 52) describes the line as reaching the north bank of the Hiwassee River below the mouth of Cane Creek. The map shows that the line reached the Hiwassee River at the mouth of said creek. While the report shows no crossing of a stream between the Hiwassee River and the Georgia line, the map shows that a stream called creek was crossed.

East of the boundary line where it approached the Tennessee River on the north side, appears a stream running into said river on the north side about five miles up the river. This stream is shown by the proof (Rec., p. 300) to be in approximately the right place for what is now known as Twenty-Mile Creek, whose mouth is about opposite the middle of the length of Chocoe River, and between which and said Chocoe River runs a mountain ridge, as sketched into said map of 1821.

The circles along the boundary line indicated on said map of 1821, supposed to indicate miles, are at irregular and uneven distances, so as not to offer any criterion for distance.

The evidence shows it to be impossible to locate the boundary line, even where it is not disputed, along the crest or extreme height of the mountain by the sources, judged by the north and south points of the compass, of the short lines shown on said map of 1821.

If any of the distances between circles along the entire boundary line are to be given any course or degree, it must be in accordance with, and the relation of said line to, the north and south points on said map of 1821.

In other words, the course of each and every line between said so-called mile circles is controlled by the north and south points indicated on said map.

That the supposedly due south line from the end of the Unaka Mountain to the Georgia line is about seven degrees off of the due south line, as shown by the north and south compass line on said map, is practically admitted by Burns (Rec., pp. 322, 323), and unquestionably established by the evidence.

Williams, Rec., pp. 1421-1422.

Defendant might safely have rested her case in opposition to the claims of complainant upon said report and the portrayal of the boundary line upon the crest of the mountain by said map of 1821, as is practically conceded, but in a matter of this importance, desiring to leave nothing to inference, has attempted to have the courses or degrees of said map judged by the north points thereof laid down on the ground by actual survey, and found it to be impossible to fit the courses judged by the north and south points of said map and the distances claimed to be indicated thereon to any part of the main ridge of said mountain, even where it is undisputed.

W. D. Hale, County Surveyor of Monroe County, long and widely experienced in surveying mountain lands and boundaries, was examined in 1908, in the bill of review case instituted by Hopkins, and after a careful examination of the

map of 1821 and an attempt to apply its courses and distances by survey along the line where it is disputed and undisputed, testified:

"Q. Please state what mile trees you know that are disputed?

"A. The 50th-mile tree and the 59th-mile tree.

"Q. You have seen both of these trees, then?

"A. Yes, sir.

"Q. State whether or not you have taken the newly discovered map and gone upon the ground at the places now in dispute, and undertaken to locate the State line, taking said newly discovered map as your guide?

"A. I have.

"Q. Please state what you did as a preliminary before going upon the ground and who, if any, were with you assisting?

"A. O. W. Muller was with me assisting with scale and protractor to get as nearly as possible the courses and distances from the newly discovered map. Then I went on the ground at the 59th-mile tree and attempted to run the State line by those courses and distances.

"Q. State whether or not you found anything on the newly discovered map that indicated mile points, and, if so, what?

"A. I found circles on the map at certain intervals that I judged by counting them were intended to indicate the ends of the miles, and by scaling, too.

"Q. The scale of said map, I believe, is 800 poles to the inch?

"A. Yes, that is the scale given on it.

"Q. Did you find those circles about corresponding as indicating a mile upon said map?

"A. Approximately; some are longer and some are shorter.

"Q. But before going into the thing on the ground to do the work, state whether or not you undertook to get the degrees and angles as indicated upon said map in the neighborhood of the disputed territory?

"A. I did; that was the work that O. W. Muller assisted me in.

"Q. State whether or not it was possible to get an accurate and correct degree and angle of that line, as indicated upon that map?

"A. No; because of the scale of the map being so small, I could only get an approximate course and distance of it.

"Q. I understand, then, you did the best you could to get the degrees and angles before going upon the ground?

"A. Yes.

"Q. When you went upon the ground, where did you begin your work?

"A. At what we counted to be the 59th-mile tree.

"Q. Did you then undertake to run the line in accordance with the degrees and angles as indicated upon this newly discovered map?

"A. Yes.

"Q. From the 59th-mile tree going southwest to the river, state whether or not there is any dispute as to the location of the State line?

"A. I never heard of any. I have been with a good many of the natives of that country, and talked with them about it, and I never heard of any dispute.

"Q. Where is the 59th-mile tree with reference to the State road run, from Tennessee to North Carolina?

"A. It is two and one-half miles northeast of the State road.

"Q. Then you tried to run a line in accordance with the degrees and angles as shown upon the newly discovered map from there to the Tennessee River, did you?

"A. Yes.

"Q. Were you able to follow the marked trees on top of the ridge from that point?

"A. No.

"Q. Please explain whether you were on one side or both sides of the top of the ridge, and, if so, how far did you get from the top of the ridge where the State line marks are at any point?

"A. In the first mile run southwest from the 59th-mile tree I got something like 500 yards to the North Carolina side; in the second mile, I crossed on to the

Tennessee side, and got more than half a mile down off the mountain, across streams and spurs, and ran down a stream a good ways. When I crossed the pike road I was, by the distance on the pike road, judging by walking it, at least a mile from the State line, following the State road. Then in the next mile I crossed into North Carolina a quarter of a mile from the State line; then I crossed back into Tennessee, and got from one-half to three-quarters of a mile from the State line.

"Q. From your efforts and the work you did there, and your knowledge of the State line, is it possible to take said newly discovered map, and with it locate the State line as indicated along the territory where it is undisputed?

"A. No; it is not. The map, instead of being an aid to locating the State line or finding the State line, is rather a hindrance.

"Q. Have you heard the testimony of D. B. Burns and C. Z. Denton, taken yesterday and today in this suit?

"A. I have heard part of it; I didn't hear very much of Mr. Denton's.

"Q. Did you hear them tell where the undisputed State line struck the Tennessee River?

"A. I did.

"Q. Half a mile above the mouth of Slick Rock Creek?

"A. Yes.

"Q. State whether or not there is where the marked trees—in fact, show that the State line does strike the Tennessee River?

"A. It is.

"Q. Crossing the river and taking this newly discovered map as your guide, is it possible to locate the line up Slick Rock Creek?

"A. No.

"Q. Please explain why?

"A. Why, crossing the river at right angles as indicated by the map you would be half a mile east of Slick Rock Creek, and taking the bearings as near as can be ascertained from this map and following them, and you will be crossing back and forth across

the ridges and foot hills and not be on Slick Rock Creek, and except in one or two places you won't approach Slick Rock Creek any less than a quarter of a mile.

"Q. This map shows that the Commissioners crossed the river at or near the mouth of some stream. Please state whether it is possible from your previous experience in surveying for that to be Slick Rock Creek?

"A. No. Following the track of the Commissioners to the river, and then following the courses of the map, as indicated you would be entirely east of Slick Rock Creek and half a mile east. While the creek on that is shown on the east side of the line instead of the line on the east side of the creek. In my opinion that is only a sketch map and have sketched Chea River on that (instead of) Slick Rock Creek.

* * * * * * *

"A. The track of the Commissioners of the marked trees show that they struck the river fully one-half mile east of Slick Rock Creek. Cheah River is the first stream of any size east of the line—it is about one mile east of the line—and is the stream that would naturally show on the east side of the line. And the description in the Cession Act of the State line from Tennessee River to the main ridge would naturally take the Commissioners from the river direct from the point at which they struck it and crossed it, up the ridge, that is east of Slick Rock Creek and west of Cheah River."

Rec., pp. 1125, 1126, 1127, 1128.

This testimony he confirmed by subsequent examination and attempts to survey said line by the courses and distances indicated on the map of 1821.

Rec., pp. 1143, 1144, 1158, 1161, 1158, 1175.

Oscar W. Muller, examined in 1908, in the bill of review case, was asked:

"Q. State whether or not you undertook to get the degrees and angles as indicated upon said map

so you could undertake to run the line in accordance with the said degrees and angles?

"A. I did.

"Q. State whether or not it was impossible to take these calls and locate the State line, by the map as shown to you today?

"A. We could not fit it to the territory."

Rec., p. 1169.

"Q. Please state whether it is possible to make the newly discovered map and the line indicated thereon correspond with and follow any ridge on the west, or northwest, side of Slick Rock Creek?

"A. It is not possible to lay these bearings and distances down on any of those ridges.

"Q. Have you recently examined the topography of the country on the south side of the river and above the mouth of Slick Rock Creek with reference to this newly discovered map?

"A. Yes, sir.

"Q. Is it possible to locate that map with reference to any particular ridge in that locality?

"A. No, sir; I think not.

"Q. State whether or not you examined the ridges and the section of country in that neighborhood of that particular view to see whether any of them would fit that map?

"A. Yes, sir, and we failed to fit them.

"Q. From the map it would indicate that the Commissioners in crossing the Tennessee River from the northeast to the southwest, crossed at or near the mouth of a stream, which stream is shown on said map. Is it possible to fit the stream and the ridges in the locality of Slick Rock Creek from said map?

"A. No, sir.

"Q. Is there any other stream in that locality which would come as near, or nearer answering the stream as shown on the map, and if so, what stream is it?

"A. Cheah River.

"Q. Where is Cheah River located, with reference to where the line strikes the river on the north side?

"A. About a mile and a quarter above.

"Q. Above what?

"A. Above where the line strikes the river; above that spruce pine that is marked on the bank of the river."

Rec., p. 1272.

Mr. Muller was examined in this case after he had gone over the ground and made a thorough investigation of the line, and his testimony above given was confirmed (Rec., pp. 1291 *et seq.*), and is epitomized in the report made by him to the Attorney General of Tennessee in December, 1910 (Rec., pp. 1308-1310).

This is confirmed by the testimony of John L. Williams, County Surveyor of Polk County, Tennessee, who has long been engaged in examining and surveying mountain lands and boundaries, and who was never employed by or did any work for any of the private claimants to the land in controversy, and whose examination and survey was made under the directions of defendant State of Tennessee, with no other instructions except to go upon the ground and determine the location of the line.

Rec., pp. 1408-1411, 1420-1425, 1428-1431, 1435.

If further confirmation of defendant's contention in this respect were needed, it is to be found in the testimony of a surveyor by the name of Libby, a partner of one of complainant's chief experts, D. B. Burns, who, as admitted by Burns when examined in this cause, testified in the Hopkins bill of review case that—

"It would be impossible for any civil engineer or surveyor to take that map and locate it according to the north point there and fit it on any ridge that is in that country today."

Rec., p. 324.

Burns and Gannett:

Inasmuch as complainant seems to rely largely upon the argument under the color of testimony of D. B. Burns and

s Gannett, in order to pull the boundary line away from
main ridge of the mountain to the gorge of Slick Rock
ek, and from the extreme height of said main ridge
and the headwaters of Tellico River to a line about four
es west crossing said river, it is proper to show to your
ors that these witnesses, not in the employ of complain-
North Carolina, but of Hopkins and Cozad, have added
developed no new fact to this record, unless it be the
ked tree found by them between the fore and aft tree on
north bank of the Tennessee River and the mouth of
k Rock Creek on which it is claimed they found marks
enough to have been made in 1821.

Their testimony in relation to some additional trees found
the other marked trees on Slick Rock Creek, and on
ridge leading from said creek to the Fodderstack ridge,
merely cumulative, and, indeed, the mass of trees bunched
different places along the line of North Carolina's present
ention, as shown on Burns' map, facing page 256 of the
ted record, would, without more, raise a question that
as never intended to mark a boundary line with such
ers of trees, and nothing like them in number or posi-
is shown on other parts of the undisputed line.

urther, Burns and Gannett went to the work of their
loyers not for the purpose of making surveys and de-
ing reasonable and logical conclusions therefrom, but
the purpose of making argument to sustain a line pre-
sly settled on.

. Burns:

hen offered as a witness in this cause by complainant,
s, on his direct examination, did not disclose that he
only had been, under the bill of review, in the employ
opkins and Cozad, but that he was still in their employ,
nt of the Whiting Company, the vendee of or holding
ption from Hopkins and Cozad, but these facts were
loped on cross-examination.

Rec., pp. 291-293.

Previous to Burns' examination under the Hopkins bill of review, he had been furnished not only with the map of 1821, but also with all the testimony previously taken in that case, and was familiar with the holding of the special master, the judge of the Circuit Court of the United States at Knoxville, and of the United States Court of Appeals at Cincinnati.

He went upon the land after digesting that record with the map of 1821 in his possession, and without even going upon the south side of the river or making any actual survey on the north side, according to the courses and distances shown on said map, after communing two or three times with "Polaris" and sighting through his compass on the north side of the river to different parts on the south side, he and his associate and partner, Libby, within twenty-four hours after his arrival on the ground, determined that beyond a doubt the line ran up Slick Rock Creek.

Rec., pp. 298-9.

We submit that, after this confession on his part, his entire testimony must be regarded as a strained argument in favor of his employers.

To illustrate the extent to which Burns was willing to go in the interest of his employer, he attacked the marked sourwood on the Hangover Lead, testified to by Hale, Wilson, and Muller, as shown above, and found to have been a tree carrying State-line marks made in 1821 by the special master, the United States Circuit Court at Knoxville and the Court of Appeals at Cincinnati, and though he had never seen the blocks taken from that tree and submitted to the court in Belding *vs.* Hebard, and had not seen that tree until some fourteen years after the block had been taken there from, he declared without qualification that he knew that that tree never had any State-line marks on it. He was not content to say that in his opinion it never had any such marks, but he said, "I **know** that it never had any State-line marks on it."

Rec., p. 245.

Although not a woodsman, he is an expert map-maker, and when it suited the purpose of his argument in making a map he had no compunction in suppressing natural objects having the most vital relation to, if not absolute control over, the settlement of this question of boundary. For instance, he exhibits with his testimony, facing page 250 of the printed record, a map called "Complainant's Exhibit B," containing three diagrams or skeleton plats, the two lower of which appear in a scale so reduced as to be meaningless, and the upper of which on a similar scale purports to be what he terms "a tracing of the line settled, run and marked by the Commissioners of 1821, as shown by their plat," and although he places thereon the stream just south of the Tennessee River, marked "Creek," nevertheless he wholly omits therefrom the Hiawassee River, shown on said original map of 1821 to be crossed at the mouth of Cane Creek, and also the smaller stream between the Hiawassee River and the Georgia line, marked "Creek" on the map of 1821, and in addition to that omits the headwaters of Tellico River, shown on said map of 1821 to begin just west of the boundary line, and in the face of the plain showing of the Tellico River on said map of 1821 Burns declared that said map "does not show Tellico River."

Rec., p. 281.

Repeatedly he declared that the courses and distances noted on said map of 1821 are surprisingly close to his survey and the present North Carolina contention, and when the utter inconsistency of the location of the stream marked "Creek," just south of the Tennessee River, with the North Carolina contention and other matters to be hereinafter noticed were pointed out, he falls back upon the claim that the map is but a sketch anyway, and not intended to accurately locate such natural objects as the stream south of the Tennessee River and the headwaters of Tellico River.

He never made and he does not pretend to have made a survey of any course or distance shown on said map of 1821,

according to the points of the compass, as thereon indicated.

North of the river he merely followed the undisputed marked line down to the marked fore-and-aft tree on the bank of the Tennessee River, one-half mile above the mouth of Slick Rock, and though he in effect admits that the line passing through that marked fore-and-aft tree would cross the river to the Hangover Lead, he arbitrarily turned down the river almost at right angles until he reached a point opposite the mouth of Slick Rock Creek.

Rec., pp. 272 and 273.

He said (Rec., p. 358) **that he went down the river following marked trees**, but on cross-examination he is compelled to admit that when he first ran down the river and determined that the line there followed meanders of the river he had not found and had never heard of the tree to which he referred—that is, tree No. 30 on his map, which has the honor of having been discovered by Mr. S. S. Gannett.

Rec., p. 397.

He and Gannett claimed that the course of the line crossing the Tennessee River is approximately south 70 west, but the marked line, even as surveyed by them, which ran through that marked fore and aft tree on the bank of the river and pointed straight across the river, is south 49 degrees, 24½ minutes west.

Rec., p. 665.

This illustrates how little of suprising accuracy and practical exactness there is between the course of the map of 1821 and the line admitted to have been run and adopted by the Commissioners.

Burns admits that the Commissioners could not have run the short straight lines shown on said map of 1821, and claims that while they followed the meanders of the mountain they sighted from point to point, and then he is com-

pelled to admit that the meanders of the mountain from one of said points to another a mile away would be much longer than a mile.

Rec., pp. 319, 320.

He had left the inference that sighting from a point north of the river where he located, but did not find the 64th-mile tree along the course shown by the mile crossing the river, would be in the general direction of Fodderstack, but an extension of that mile crossing the river on the same course shows that it passes west and north of Fodder-tack, as claimed by Burns, something like three miles. (See map of 1821, facing p. 976 of the printed record; Williams, Rec., p. 1475.)

Further, he repeatedly and arbitrarily, as we insist, referred to places with such modern names as Fodder-tack, Junction, County Corners, and Jenks Knob **as being shown on the map of 1821** without any possible warrant therefor save his own argument and deductions.

Rec., pp. 248, 249.

Your honors will bear in mind that it is established in this record beyond contradiction that passing down the undisputed boundary line northeast of the river the most prominent object in view is the [redacted] Mountain and the ridge plainly leading from it down toward the river, and that about a mile and a quarter east of this ridge is the Cheoee River or Creek, which runs nearly parallel for something more than a mile with the Hangover Ridge, and then southeast approximately parallel with the Tennessee River; that on the west of said Hangover Ridge is Slick Rock Creek, only about a third as large as Cheoee River or Creek. The waters of Cheoee River may be plainly seen from different positions on the undisputed line north of the river, and are in plain view of any one on the Hangover Mountain.

While the location of the **mouth** of Slick Rock Creek may be seen from the boundary line north of the river, neverthe-

less it is not claimed, as we understand, that the waters of said creek are visible from said undisputed boundary north of the river.

When Mr. Burns was further cross-examined at Knoxville in 1910, the copy of the map of 1821, which he had exhibited with his deposition taken at Asheville, was not present, and so to test his positive statements that the point on said map—according to its scale about seven miles southwest of the Tennessee River, where the line seems to make an abrupt turn to the left—was Fodderstack, and a point about three miles southeast from Fodderstack was the junction of the Fodderstack Ridge with the main mountain, he was asked to locate on the copy of the map of 1821, filed as Exhibit A to the deposition of Onley Williams, facing page 976 of the printed record, Stratton Bald, the Hangover, and Cold Spring Knob, and from Cold Spring Knob draw a line down the Hangover Lead or Ridge to where it bluffed off at the Tennessee River opposite the marked fore-and-aft tree.

After Burns had located on said Exhibit A to Williams' deposition, and identified with his initials his claim as to Fodderstack and Junction, and had placed thereon Stratton Bald—all in red ink—he was asked to locate Hangover (Rec., p. 328), but at once the light became so dim that he could not see; but, on the morrow, with Mr. Hopkins present and coaching him, he was finally induced to locate Hangover, Cold Spring Knob, and to a dotted red line down where the Hangover Ridge would be, assuming that the boundary line ran up Slick Rock to Fodderstack, and at the end of Hangover Ridge, opposite the marked fore-and-aft hemlock tree, he placed a circle in red.

Rec., pp. 329-332.

So it appears, according to Burns' testimony, the greater part of the stream marked creek, just southwest of the river, is entirely east of the Hangover Mountain and Hangover Lead, which it crosses about two miles from the river at a

point where said Hangover Lead or Ridge is about a thousand or twelve hundred feet above the Tennessee River, and about the same elevation above the creek as it actually runs.

We submit that no one passing over that ground there by way of Fodderstack or along the Hangover Ridge, and from Hangover and Stratton Bald Mountains, could have intended the stream marked "Creek" to be Slick Rock. Not even a mere sketch could be so utterly misleading and at variance from the facts.

Further, if that stream marked "Creek" was intended to be Slick Rock Creek, even if it were merely sketched, without any regard to accuracy, it can hardly be conceived that it would be placed east of that tremendous mountain known as Hangover, when Hangover is east of said creek—east of the headwaters of said creek—and must have been so seen by even a casual wayfarer through that region. Locating Hangover southeast of the left prong of said **stream marked "Creek"** would place it at a point wholly disconnected with the main mountain, and about four miles from it, as marked in red letters "H H" on said Exhibit A to Williams' deposition, the explanation for which is to be found in question and answer No. 143 to the deposition of John L. Williams.

Rec., p. 1420.

If the, as we submit, impossible contention of complainant be granted, then the map of 1821 fails to show not only the abrupt turn at the marked fore and aft tree on the north bank of the river, and the line following down said river for about one-half mile, and that it follows a creek or stream of any sort for five and a half miles, but it also fails to show the main mountain (that is, the Hangover Ridge or Mountain) where the Fodderstack strikes it, and where said main mountain towers several hundred feet above the point where the Fodderstack Ridge joins not the crest, but the side of it.

Further, to illustrate the latitude which Burns allowed himself in testifying or arguing as to the "surprising accu-

racy" between the map of 1821 and his own survey, it is to be noted that while at the southwest end of the line he allowed for variation in the compass caused by the lapse of ninety years, but for some unthinkable reason made no such allowance in his so-called survey in the Slick Rock region.

Rec., p. 321.

Further, he admitted to having testified in his original examination at Asheville that "from Hac around to Stratton Bald the timber is scrubby, **but there are several trees that show State-line marks,**" into which he afterwards interpolated, after the word "trees," the words "were old enough," so that his answer should read, as now found in the record, "From Hac around to Stratton Bald the timber is scrubby, but there are several trees that were old enough to show State-line marks."

Rec., pp. 334, 335.

We submit that this witness knew the difference between his statement that there were trees on that mountain **which showed** State-line marks and the subsequent statement that there were trees there **old enough to show** such marks.

In his effort to combat the testimony of not only Williams, Hale, Muller, Kent, and McNab, but also the admissions of Gannett, Hayes, and Hyde, to the effect that the Hangover Mountain and Lead is the "main ridge," he makes the surprising statement, notwithstanding Stratton Bald and Hangover tower nearly a thousand feet above Big Fodderstack, that "if you go up on Stratton Bald, where you could get a good view of the mountain, I would take Big Fodderstack Mountain as the main mountain and the leading ridge," and that he would follow that as the leading mountain and ridge down over Little Fodderstack and Stiff Knee to the first big bend of the river below the mouth of Slick Rock.

Rec., p. 341.

Again, he is driven to contend that neither the Tennessee contention nor the North Carolina contention conforms to the Cession Act of North Carolina, and he claims that the line to conform to that act should have left the mountain on the north side of the river some three or four miles or further from the river, and ran down to the Tennessee River "two or three miles maybe at the first big bend in the river to the left below the mouth of Slick Rock Creek; crossed the creek at that point and back up the ridge that leads up Stiff Knee, Little Fodderstack, and Big Fodderstack."

Rec., p. 350.

That is what he would call the main ridge.

Rec., p. 351.

Mr. Burns' facility in making maps and changing courses and calls thereon to suit his argument and the interest of his employers will be hereinafter further down.

S. S. Gannett:

This witness qualifies as an expert cartographer. He has held and holds a high position in the United States Geological Survey and has been an appointee of this court. When asked on direct examination how he happened to have anything to do with this case, he answered:

> "The Attorney General of North Carolina requested the Geological Survey to investigate that question and find out, if possible, where the original line was run and marked, and I was selected by the director of the Geological Survey to engineer the work."
>
> Rec., p. 411.

From a witness so selected it would not be unreasonable to expect candor and fair dealing and testimony having weight with this court.

But Mr. Gannett, in his answer above quoted, did not disclose the whole truth, if indeed his statement be true at all. He admitted on cross-examination that he never had any correspondence or conference with the Attorney General of North Carolina, but that he did have a conference in Washington with Mr. William R. Hopkins; that he met one of Mr. Hopkins' special counsel in Washington; that later he met another of the eminent special counsel at Asheville; that Hopkins paid him for his services in making his survey, and that eminent special counsel in the employ of Hopkins and Cozad paid him his charges and expenses as an expert witness.

Rec., pp. 455-456.

It was regrettable, but necessary to give proper coloring to the weight and credibility of Mr. Gannett's testimony, to remove this high Government official from his assumed pedestal of impartiality and reduce him to the position of an ordinary hired expert.

During his examination-in-chief at Asheville Mr. Gannett had testified to the contents of a number of maps in the Congressional Library at Washington as bearing on the controversy in both the Tellico and Slick Rock regions, and had described said maps as favoring or conforming to the contention of complainant in both localities. On cross-examination in Washington several months after his original examination at Asheville it was elicited from Mr. Gannett that before going to Asheville to testify he had visited the map department of the Congressional Library, had examined the maps there supposed to bear on the controversy, had made memoranda therefrom, and had said memoranda before him when he was testifying, and he was compelled to admit, among other erroneous statements, that his statement that a map by David H. Burr, claimed by Gannett to have been made for the use of the Committee on Post Roads and Post Offices in 1835, "showed the line following Slick

Rock Creek" (Rec., pp. 425-426) was not correct—indeed, said map shows nothing at all as to Slick Rock Creek.

Rec., p. 448.

He further admits that he erroneously stated, even though he had his memoranda before him and was testifying therefrom, that all of the maps to which he had been referring showed the line up Slick Rock Creek.

Rec., pp. 449-450.

These statements he had endeavored at some time to modify; whether before he was given notice that he would be further cross-examined at Washington does not appear. Certain it is that it is difficult, to put it mildly, to understand just when such a witness is testifying to a fact or to something which he supposes may or intends to aid his employer. There was no excuse for this intelligent witness to so grossly misrepresent the contents of the maps in question, because he, an expert cartographer, had gone to the Congressional Library, and had taken from said maps all the memoranda deemed necessary by him to speak the truth fully in regard thereto. That he was intending to aid his employer, and, to put it mildly, was somewhat careless with the truth, is disclosed by the following testimony:

> "Q. Did you have your notes there with you at the time?
>
> "A. I had them in the city, yes sir.
>
> "Q. You at that time were testifying as the expert witness called in the name of complainant, that the line did run up Slick Rock Creek, were you not?
>
> "A. That was one of the reasons.
>
> "Q. And you were citing all these different maps as confirming and corroborating your theory as to where that line should run, were you not?
>
> "A. Yes, sir."
>
> Rec., p. 450.

After this Mr. Gannett became less positive in his statements intended to favor North Carolina's contention, and he admitted that a line run on the extreme height of the Smoky Mountain from Pigeon River to Unicoi Mountain would conform to the Cession Act, and that the map of 1821 shows a line running from the river to Unicoi Mountain, except for a short distance just south of the river, "where it follows the creek about a mile and a half right near the creek," and then at the end of the second mile goes to the top of the mountain.

Rec., pp. 452-453.

Mr. Gannett also admitted that, going down the mountain on the northeast side of the Tennessee River and following the undisputed line, Hangover is plainly in sight, as is the ridge leading from Hangover to the river, in fact, he admits that going down the undisputed line on the northeast side of the river the line approaches "almost directly the foot of Hangover Ridge"—that is, the foot of the ridge which leads up to Hangover, which later on he admits "**is certainly the main or big leading ridge.**"

Rec., pp. 460, 461, 511.

Further, he admits that from the point on the north side of the river where stands the undisputed fore and aft hemlock tree the most direct route to the main mountain is along the Hangover Ridge or Lead.

Rec., p. 481.

He further admits that if the line were run across Tennessee River to a point at the mouth of a stream the report should have shown that fact, and that would have been the natural thing for the Commissioners to have done, as was done where the line crossed the Hiwassee River at the mouth of Cane Creek, which the proof shows to be a smaller stream than Slick Rock.

Rec., p. 457.

Gannett's idea is that the 61th mile tree was located about where tree No. 25 is placed on Burns' map, Complainant's Exhibit D, between a quarter and a third of a mile north of the river, and he admits that the mouth of Slick Rock Creek from that point is nearly due west—that is, about twenty degrees off from the supposed course of the line crossing the river, according to the points of the compass on the map of 1821.

Rec., p. 519.

He also admits that the turn down the river could have been shown on the map of 1821, even according to the scale of that map, and that it should have been shown, assuming that the line ran down to the mouth of Slick Rock from the undisputed fore and aft hemlock tree.

Rec., pp. 519 *et seq.*

Although he had testified during his examination in-chief that the map of 1821 "tallies practically exactly" with the conditions on the ground along the line of the North Carolina contention, he was compelled to admit on cross-examination (Rec., p. 537) that not one of the straight lines indicated on said map could have been so measured—that is, run on the ground. He claimed that the surveyors must have sighted from one summit to another and indicated the distance between summits by the straight lines, but he admitted that the distances as actually measured would be longer than the line represented, and he also admitted that to run according to the course or degree apparently indicated by said straight lines would carry one into Tennessee on the west or into North Carolina on the east, and so he was compelled to admit that the map did not tally as he had testified either as to course or distance with the point found along its undisputed parts.

Rec., p. 479.

Further, bearing in mind that North Carolina's contention, as claimed to have been surveyed by Burns and Gannett, follows up Slick Rock Creek for a distance of five miles, sometimes on the west and sometimes on the east of said creek, Mr. Gannett was compelled to admit that the second mile circle southwest of the river on the map of 1821, claimed to represent the 67th mile, does not conform in any way to either survey; that it is on a mountain away from the stream marked creek, and that at the end of three miles from the Tennessee River, where Burns' survey is on the east of Slick Rock Creek, the third mile circle from the river, as shown on said map, is not only not on a creek, but on a mountain over a mile and a half west of the stream marked "creek" on said map of 1821, and that the fourth mile circle south of the river, supposed to represent the 69th mile, instead of being on a creek is shown by said map to be on the crest of the mountain two miles or more west of the creek, and that the fifth mile circle south of the Tennessee River, supposed to represent the 70th mile circle, is on the crest of the mountain about four miles west of the stream marked "creek" on said map.

Rec., pp. 480, 517.

Mr. Gannett endeavors to explain this manifest inconsistency between Burns' survey and the map of 1821, and also his previous testimony to the effect that one practically tallied with the other by saying that "the stream is simply sketched in there."

Rec., p. 517.

We submit that this is an explanation which does not explain, and he is compelled to admit that if the 70th mile circle—that is, the 5th circle south of the river—be on Hangover Ridge five miles southwest of the river the distance between that point and the nearest point of Cheoe River would be just about four miles.

Rec., p. 517.

This "tallies practically exactly" with the Tennessee contention.

During his direct examination and before he had been compelled to admit that the Hangover Ridge and Mountain was certainly the main mountain, Mr. Gannett had testified that the ridge up by Fodderstack would have a higher average elevation than the ridge up to Hangover.

Rec., p. 121.

On cross-examination one of his own topographical maps was placed before him, and he was asked to show the elevation above sea-level on the point where the State line, according to the Tennessee contention, crosses the Tennessee River, and from the elevation shown on said map he answered that it was about 1,200 feet. He was then requested to point out from the map the elevations of the two lines representing the respective contentions of the parties taken at intervals of one-half mile, beginning with the river and running seven miles, which, according to the North Carolina contention, reached Hangover Ridge. After he had given the elevations in detail at the different points requested (Rec., pp. 169-171), a summary thereof was put to him, which he admitted to be correct. It is as follows:

> "Q. So that running those two lines from the river seven miles we have the approximate elevations above the river as follows: At the distance of one-half mile from the river 700 feet on the Tennessee line and 50 feet on the North Carolina line; at the distance of one mile from the river on the Tennessee line the elevation above the river is about 600 feet and on the North Carolina line at a distance of one mile it is about 100 feet; then at two miles the approximate elevation on the Tennessee line is 850 feet above the river, while that of North Carolina is only 250 feet; at the distance of three miles on the Tennessee line the approximate elevation above the river is 2,350 feet, while on the North Carolina line it is only 600 feet; at four miles from the river on

the Tennessee line the approximate elevation above the river is 2,600 feet, while on the North Carolina line it is only 800 feet; at the end of five miles from the river on the Tennessee line the elevation above the river is approximately 3,000 feet, while on the North Carolina line it is only about 900 feet; and at the end of six miles on the Tennessee line the elevation above the river is 4,000 feet, while on the North Carolina line it is between 3,100 and 3,200 feet; at the end of seven miles the elevation on the Tennessee line above the river is about 3,900 feet or more, and on the North Carolina line it is only 3,300 feet. That is correct, is it not?

"A. Yes, sir; that is, the elevations are approximate; they are not absolutely exact.

"Q. **Now can there be any doubt about which is the greater average elevation of those two lines?**

"A. **No, sir; one is up a ridge and the other is partly up a creek.**"

Rec., p. 171.

That would seem to settle the matter, but, inasmuch as he had admitted that the main ridge began and is at Hangover and Burns claims it is at Fodderstack, he was asked to give the respective elevations of Hangover, Hao, and Stratton Bald, which are on the mountain, and cover that part thereof to a point where it is joined lower down by the Fodderstack Ridge, and also to give the elevations along Big Fodderstack Ridge toward its junction with the main mountain. The elevations given by him are as follows: The elevations along the Hangover or Tennessee contention are, respectively, 5,100 feet, 5,000 feet, and 5,300 feet, while the elevations along the Fodderstack Ridge toward Junction are 4,300, 4,200, 4,400, and 4,900.

Mr. Gannett had been connected with the United States Geological Survey for many years, and it is conclusively established by this record that the first Government map or topographical sheet which referred to or even apparently indicated the line between the States to be along Slick Rock Creek appeared in 1884 or 1885, after he and a man by the

name of Yates had been out in what is now the disputed territory surveying or determining high points "by triangulation," and that after their return to Washington Yates, in making up the map, indicated the boundary line along Slick Rock Creek. He does not pretend that Yates had any authority therefor.

Rec., p. 482.

What has become of Yates is not shown, but it does appear that Mr. Hopkins found Mr. Gannett.

Further, when Mr. Gannett was testifying at Asheville, he referred to a map compiled in 1865 by W. L. Nichols and A. Lindankohl, members of the United States Coast and Geodetic Survey. He stated that they had in their possession a plat of the Ocoee district, and he further testified that on the map compiled by Nichols and Lindankohl "the line was shown as running up Slick Rock Creek."

Rec., p. 422.

There is a copy of the Nichols and Lindankohl map of 1865 in the Congressional Library, and Mr. Welti, first assistant of the Map Division of said Library, testified in substance that said map shows **the boundary line running southwest from the river on top of a mountain** and the Tellico River to the west of that line, and **that just east of the line,** where it crosses the Tennessee River, **Cheoee River appears to run into the Tennessee River**.

Rec., p. 933.

Recurring once more to the reiterated statements of both Burns and Gannett to the effect that they had tested the map of 1821 and the report of the Commissioners with their surveys, and that the results were surprisingly accurate (Rec., p. 259) and "tallied practically exactly" with their surveys and the North Carolina contention (Rec., pp. 133-4), in addition to showing the wide difference in the matter of distance, we will now select three points to illustrate how wide of the

truth are their statements in the matter of course as well a
of distance.

They did run the line north of the river, not by the com
pass calls of the supposed mile lines shown on the map, bu
by the line of marked trees, and to test this surprising accu
racy we need only to refer to any one mile north of the river
and inasmuch as Gannett began his survey at the 59th mil
we will use that for purposes of illustration at that point.

An examination of the map shows that the line from th
supposed 59th to the supposed 60th mile circle is absolutely
straight, showing no variation in the course for the entir
mile. An examination of Gannett's testimony, found o
pages 458-459 of the printed record, shows more than twenty
five **different courses**, many of them widely variant, in tha
mile, and Gannett was compelled to admit that instead of i
being a straight mile his survey made a very crooked line.

Next we call to the attention of the court the mile betwee
the supposed 100th and 101st mile circle—the latter bein
the circle where the line turns due south toward the Georgi
line. This is also a straight line, but the actual survey alon
the crest of the mountain shows from fifteen to twenty dif
ferent courses—a very crooked line.

Rec., pp. 454-455.

Further, we call to the attention of the court that the lin
reaching the so-called 86th-mile circle is straight for the en
tire mile, but the line reaching the holly tree, as run on th
ground, like others, is extremely crooked, showing some fif
teen or twenty different courses covering the distance of
mile.

Rec., p. 540.

Mr. Gannett was forced to the conclusion that the Commis
sioners abandoned the meanders—that is, the crest of th
mountain (Rec., p. 442)—and that it was impossible to ru
"a straight line a mile on the mountain, because the moun
tain has all kinds of crooks and turns in it."

Rec., p. 437.

And he admits that he and Burns did not try to follow the lines indicated on the map.

Rec., p. 438.

The Burns and Gannett Marked Tree No. 30 on North Bank of the River About Half Way Between Hemlock Fore-and-aft Tree and the Mouth of Slick Rock Creek.

Much reliance seems to be placed by complainant upon a tree said to have been discovered by Gannett, bearing State-line marks about half way from the marked fore-and-aft hemlock on the north bank of the Tennessee River, and the mouth of Slick Rock Creek, which tree is designated as "Tree No. 30" on Burns' map, Complainant's Exhibit D, a copy of which is found in the printed record facing page 250.

It is to be noted that this tree was found by Gannett after his employment by Hopkins in this case, and, as shown on said map, is the only tree claimed by complainant to bear State-line marks on her line from the marked fore-and-aft hemlock down the north side of the river for about one-half mile to a point opposite the mouth of Slick Rock Creek. The fact that this tree was found by Gannett is significant, as showing the wonderful imagination and aptitude of Burns in giving reasons for his actions where no basis for such reasons existed in fact. It is to be borne in mind that Burns testified that prior to his examination as a witness in the bill of review case he, within the short space of twenty-four hours after a cursory examination of the territory on the north bank of the river, and sighting a few times through his compass to points on the south side of the river, determined that the line should run up Slick Rock Creek, but he had also been forced to the conclusion that on the north side of the river the boundary line ran down to and reached the river at the marked fore-and-aft hemlock. In giving his reasons for not following the course of that line through the marked fore-and-aft hemlock directly across the river, and for turning at almost a right angle down the river, he said

that he was "satisfied then, after following the marks down the Tennessee River, that the stream marked 'Creek' upon the original plat of 1821 was Slick Rock Creek."

Rec., p. 358.

The fact is that at that time he had not found and did not claim to have found any marked trees down the Tennessee River, causing him thus to turn the line at right angles from its course, and he was compelled to admit on cross-examination that he never saw tree No. 30 before the Saturday previous to his cross-examination on December 2, 1910.

Rec., p. 397.

This tree on the Saturday previous to his examination on December 2, to wit, November 26, 1910, he blocked and claimed that it showed original State-line marks, two hacks and a blaze, made in 1821, and that it also showed marks made 57 years before, that is, in 1853. This tree, a chestnut, was blocked by Burns on the west side, the east side appearing to have been blocked a short time previous thereto, so that the blocking by Burns absolutely destroyed all of the marks on the tree, but Burns did not hesitate at a matter of this sort.

Rec., pp. 342, 343, 368, 369.

The facts in relation to the blocking on the east side are, in brief, that W. D. Hale, John L. Williams, and C. B. McNab were sent by the State of Tennessee to examine tree No. 30, claimed to have been found by Gannett, and also claimed by him to bear State-line marks, and in September, 1910, these old woodsmen went to said tree and found two hacks and a blaze to be on the east and also on the west side thereof. They blocked the east side, cutting out a short block, and found the blaze to be 57 or 58 years old. This block was introduced in evidence. They also cut farther into the tree on the east side looking for marks that might have been made as early as 1821, but found none.

Rec., pp. 1149-1150.

The block exhibited by Burns was submitted to the examination of Hale, McNab, and Williams, and they testified, giving in detail their reasons, that what appeared to Burns to be two hacks and a blaze was in reality four distinct hacks and no blaze. So that a marking of that sort did not fit either the fore-and-aft (two hacks and a blaze) or the side-line marks (three hacks), called for in the report of the Commissioners.

Hale, Rec., pp. 1151, 1153, 1633, 1634.
Williams, Rec., pp. 1443-1444, 1574, 1575.
McNab, Rec., pp. 1526-1528.
Kent, Rec., pp. 1515, 1516.

In 1852 the State of Tennessee issued a grant to Jessie H. Parsons, which began on the north bank of the Tennessee River where the State line crossed said river and ran northeasterly with the line between the States a certain distance, then northwest into Tennessee various courses, thence southwest to the Tennessee River, and thence up said river with the meanders thereof to the beginning corner (Rec., p. 1155), and it is shown by Hale, who was familiar with the location of this grant, that the last line thereof, to wit, thence up said river with the meanders thereof to the beginning corner, would run along where tree No. 30 was found (Rec., pp. 1155-1156). So that in all probability the marks found on said tree to have been 57 or 58 years prior to 1910 were made in surveying the Parsons grant.

CHEOAH RIVER.

The stream marked "Creek" running into the Tennes River on the south side just east of the line, as shown on map of 1821, defendant insists, is the Cheoah River or Cre

It is to be noted that said stream called "Creek," after most paralleling the boundary line southwest of the ri about one and one-half miles, according to the scale of map of 1821, turns sharply southeastwardly nearly para to the Tennessee River, and that almost east of a point the middle of the length of said stream there runs into Tennessee River on the north side an unnamed stre which is admitted by Burns to be "about in the right pl for Twenty Mile Creek," as said stream is now called.

Rec., p. 300.

The significance of the location of the mouth of this named stream, just about opposite the middle of the lengt the stream marked "Creek" on the southwest side of the ri was doubtless in Burns' mind when he did not show Twe Mile Creek running into the Tennessee River on the no side, although he claims to have surveyed the Tenne River something like twenty miles eastward from the bou ary line.

Burns says that Twenty Mile Creek is six or seven m from Slick Rock (Rec., p. 300), so that if Twenty M Creek had been shown on Burns' map, Complainant's Exh D, facing page 256 of the printed record, as running into Tennessee River on its north side six or seven miles al Slick Rock, the mouth thereof would have been opposite middle of the length of Cheoah River, as pictured on Bu map.

Is it not manifest that, considering the actual location Twenty Mile Creek and Cheoah River the waters of both which were in view from points on the crest of the mount

north and south of the river, a surveyor who had gone over that route in making even a sketch map thereof must have intended the stream marked "Creek" opposite the mouth of Twenty Mile Creek to be Cheoah River or Creek, as it is sometimes called?

Further, is it not manifest that Slick Rock Creek, six or seven miles from and to the southwest of the mouth of Twenty Mile Creek, could not have been bent around opposite the mouth of said Twenty Mile Creek as delineated on the said map of 1821?

Further, we call to your honors' attention that the map of 1821 shows, by the etching thereon, a mountain or a mountain ridge between the stream marked "Creek" and the Tennessee River, extending from the junction of the creek and said river southeastwardly to a point about opposite the mouth of Twenty Mile Creek.

This is admitted even by Burns

Rec., p. 407.

The expert testimony offered by defendant is to the effect that this stream marked "Creek," southwest of the river and just east of the boundary line, was intended to be Cheoah River, but we will refer to only a brief portion of such testimony. Hale says, among other things, on this point:

> "Q. Examine this map of 1821, and state what appears to be between the junction of the Tennessee River and this stream marked a 'Creek'?
>
> "A. It has very much the appearance of having been sketched from a bird's-eye view of that territory between Cheoah River and Tennessee River. Such bird's-eye view can be had from the view on which Tennessee claims the State line to run.
>
> "Q. What does that etching between the Tennessee River and the stream marked a "Creek" indicate?
>
> "A. It indicates a ridge running nearly parallel with the river.
>
> "Q. I will ask you to state whether there is any

such ridge between Cheoah River and the Tennessee River?

"A. Yes, there is such a ridge."

Rec., p. 1175.

How the location of this stream marked "creek" impresses one familiar with the country—an ordinary woodsman—that it was intended to be Cheoah River, is shown by the testimony of Onley Williams, who was shown a certified copy of the map of 1821 (Rec., pp. 976-977) and asked to examine it, and state whether the general direction of the stream marked "Creek" conforms to the general direction of the Cheoah River. He said:

"A. Yes, on that part right here (indicating) it has the very curve of the river.

"Q. 83. You say this part here—do you mean that part covering a little more than a half inch away from where it joins the Little Tennessee River?

"A. Yes, this upper line; it is as good as a man could make it.

"Q. 84. From that point or bend, extending southeasterly, does it conform to the general course of the Cheoee River?

"A. Runs pretty much the same course. There are a few creeks that are not there—there is Robbinsville, Telula, and Snow Bird.

Q. 85. From your knowledge of that territory and stream Cheoee River, what would you say this stream marked "Creek" is?

"A. I would call it Cheoee River—compelled to.

"Q. 86. That is your best judgment of it from your knowledge of that location?

"A. Yes, because Slick Rock Creek and that other creek would not run that way.

"Q. 87. What other creeks would not run that way?

"A. Some other creeks that are there. That is bound to be Cheoee River, because I have lived there years, and have been all over there, and have been fishing there. It makes a curve back to the south,

and turns more east at Robbinsville it prongs. There are a few creeks there that are not marked."
Rec., p. 977.

And even Mr. Gannett's topographical map, exhibited in this record (pp. 1576-1577), shows the mouth of Twenty Mile Creek to be opposite the middle of the length of Cheoah River, and distant from Cheoah River by the scale of said topographical map just about as far as the mouth of Twenty Mile Creek on the map of 1821 appears to be from said stream southwest of the Tennessee River marked "Creek."

It is true that the said stream marked "Creek," according to the scale of said map of 1821, appears to be only about sixty poles, or 990 feet, east of the boundary line (Rec., pp. 1174-1175, 1197), while the Cheoah River is said to be a mile from Hangover Ridge, though the side thereof runs down closer to said river; but the distances indicated on said map are wholly inaccurate, and the difference in these distances might have resulted from what Mr. Burns called "sketching."

Is it not obvious why Burns, who claims to have surveyed the Tennessee River and noted the mouth of Twenty Mile Creek, failed to show the point on the north side of the Tennessee River where said creek flowed into it about opposite the middle of the length of Cheoah River?

Rec., p. 332.

TELLICO RIVER

Does the boundary line run on the extreme height of the main ridge around to the east of the headwaters of Tellico River, as claimed by Tennessee, or does it leave the main ridge and run across the Tellico River some four miles below and to the west of the headwaters thereof, as claimed by North Carolina?

It is established that from the main ridge just south-west of the Tennessee River to the Unicoi Mountain west of the disputed territory, the boundary line is described as being **along the extreme height of the main ridge of the mountain**, by—

1. North Carolina Cession Act of 1789.
2. By the Constitution of Tennessee.
3. The report of the joint commissioners running said boundary line in 1821.
4. The Tennessee Act of 1821 confirming the report of the joint commissioners.
5. The North Carolina Act of 1821 confirming said report of the joint commissioners.
6. The map of 1821, which not only shows that the boundary line is on the extreme height or crest of the mountain, but is entirely east of the headwaters of Tellico River.

From these concurring, undisputed and authoritative descriptions it would seem only necessary, in order to determine the location of the boundary line, to ascertain the location of the main ridge.

That the ridge upon the extreme height of which Tennessee claims the boundary line to be is the main ridge is an established fact—indeed, it is practically an admitted fact in **this record**.

The main ridge is indicated on Exhibit B to this brief by the line in solid black to the east of the headwaters of

Tellico River, from a point near Laurel Top around by way of McDaniel Bald to Jenks Knob, and on the Burns map, Complainant's Exhibit D, facing page 257 of the printed record, it is indicated by the broken or dotted line from near a point called County Corners around by McDaniel Bald, Rocky Knob to Jenks Knob.

We shall not go into the details of defendant's testimony showing the conclusive reasons given by her that this ridge upon which McDaniel Bald towers 4,672 feet above the level of the sea—and which is on the crest of the water shed between the waters running eastwardly in North Carolina and thence to the Atlantic Ocean on the one side and on the other side the waters of the Tellico River running westwardly, and thence into the Gulf of Mexico, is the main ridge, but content ourselves with referring to the facts as admitted by complainant's witnesses.

Even Mr. Gannett admits that the Tennessee contention is on the main ridge. He said:

> "Q. If it follows the ridge around the headwaters of Tellico it will go around McDaniel Bald, will it not?
>
> "A. Yes, it would.
>
> "Q. And that is the main ridge, is it not, over McDaniel Bald?
>
> "A. Yes, sir. McDaniel Bald is on the main ridge.
>
> "Q. Now, if you had a call for a location, imperishable object such as McDaniel Bald or the main ridge, that is where you would run the line to, is it not?
>
> "A. Yes, sir.
>
> "Q. And running the line in that way you would go entirely to the east of the headwaters of the Tellico River would you not?
>
> "A. That would not correspond to this plat at all according to the directions of courses and distances shown.
>
> "Q. But answer my question now. If you would follow the location call around the extreme height

of the main ridge (you would) pass to the east of the headwaters of Tellico River, would you not?"

"A. Yes, sir.

"Q. Without regard to the course and distance?

"A. Yes, sir.

"Q. According to this map of 1821 there is not a stream that breaks through the State line at any point from the Tennessee River to the Hiwassee River, is there?

"A. Not according to that plat, no, sir."

Rec., p. 456.

During his re-examination, when Mr. Burns was present assisting therein, it was endeavored to have him somewhat lessen the force of these admissions by pointing out that the report of the commissioners called for a line running southwestwardly, while the ridge around by McDaniel Bald runs southeastwardly, as far as McDaniel Bald. But this call of the report is: "Southwestwardly * * * to the Tennessee River" (Rec., p. 51)—and south of the river, the only direction is to follow the extreme height of the mountain (Rec., p. 52); and, moreover, the fact is as shown even on Burns' map, Complainant's Exhibit D, **the undisputed boundary line had for a distance of nearly four miles, been running in a southeastwardly direction, so that the line around to McDaniel Bald was and is but a continuation of the general direction of the undisputed line.**

Rec., p. 546.

Further, Mr. Gunnett says, in substance, that a person at County Corners "might easily be misled in taking the line down State ridge," which he further describes as being "a leading and **misleading** ridge."

Rec., p. 509.

Now, to pull the boundary line away from around the headwaters of Tellico, to a line running down this misleading ridge called State ridge, thence **across** the Tellico River to Jenks Knob, complainant relies upon certain marked

trees found along said State-line ridge, but especially upon a holly claimed to be the 86th-mile tree, situated on or near the foot of Jenks ridge, a few hundred feet west of the Tellico River, and on which it is claimed the figures and letter "86 M" appear.

Stevenson v. Fain, 116 Fed., 147.

And here, while the record in Stevenson *vs.* Fain, 116 Fed. Rep., 147, is not before this court or evidence in this cause, nevertheless, a question affecting the location of a boundary line between States and consequently marking the limits of Federal judicial and administrative districts is deemed by Tennessee to be too important to be determined upon narrow principles, and as she admits, though the decision is not binding upon her, that in said case of Stevenson *vs.* Fain, a litigation originating in the United States Circuit Court at Knoxville between private claimants under Tennessee and North Carolina grants, and appealed to the United States Circuit Court of Appeals at Cincinnati, the boundary line at Tellico River was determined by said courts in favor of the contention of complainant, and no doubt the opinion of Judge Lurton, while sitting on the Court of Appeals at Cincinnati, reported in 116 Fed., 147, will be referred to and relied upon by complainant in this cause.

However, we confidently submit—

The holding of the Court of Appeals in Stevenson vs. Fain must have been predicated upon evidence materially different from that disclosed in this record.

What the evidence was which led the Court of Appeals to its conclusions adverse to the Tennessee contention is not before this court, but the references thereto, as summed up by the Court of Appeals on pages 150-151 of 116 Federal Reporter, show variances in essential and vital particulars from the admitted or established facts contained in this record.

Some of these it is important to note.

(1) The line of the North Carolina contention, as described by Judge Lurton and shown by the map appearing on page 150 of said Federal Reporter, leaves the main ridge at County Corners, and then runs along State ridge, crossing the Tellico River, and thence along, by a holly, the so-called 86-mile tree **to Gold Bryson's Gap**, whereas the present contention of North Carolina claimed by her to be established by the proof in this cause, after following the State ridge and crossing Tellico River, runs by the holly tree, not to Bryson's Gap, **but to a point a mile northeast thereof called Jenks Knob**. (See Complainant's Exhibit D, Rec., p. 257.)

(2) The evidence, which was **probably the controlling and determining factor** in the conclusions reached by the Court of Appeals, is referred to by Judge Lurton (116 Fed., 151) as—

> "An ancient holly tree marked 83 M was found along this State ridge line, which **by blocking** is shown to have been marked in 1821, and to be 86 miles from the beginning"—

that is, from the Cataloochee turnpike.

To this we respectfully submit:

First, there is no proof in this record that said holly tree **is** 86 miles from the beginning at Cataloochee turnpike, and, judged by the facts in this record, **how it could have been made to appear in the record** of Stevenson vs. Fain, as found by Judge Lurton, that the 86-mile tree was shown "**by blocking** * * * to have been marked in 1821" is inconceivable, because there is not even the pretense of a claim upon the part of any witness offered by complainant in this cause that said tree had any other marks on it than "86 M," or that **it was ever blocked**.

Indeed, the proof in this case establishes—in fact, we might take it to be admitted—that said holly tree was not only **not blocked**, but that because of its hollow, as it is

expressed by one of the witnesses (Rec., p. 241), "doty," condition it could not have been blocked so as to show annular rings running back any considerable number of years.

Even Jasper Fain, claimant of the lands between the disputed lines, and who, as the record discloses, seems to be the one continually leading surveyors to the holly tree, does not claim that it had ever been blocked or that it had any marks whatsoever upon it except "86 M."

Rec., p. 205.

So that in some way testimony was offered in Stevenson vs. Fain **contrary to the facts**, as established by **this** record.

Of course, if the evidence indisputably showed—as blocking a sound tree would show—that the marks on the holly tree were made in 1821, that might be a circumstance to show that said tree was intended as a mile tree.

The markings on said tree may be briefly described as follows:

Burns, to whom this tree was shown by Fain, describes the holly tree (No. 107 on his map) as having on it "86 M", that the 8 is a very distinct gash, but that the 6 and M are defective—that the "86 M" were cut on the right-hand side as you go up towards Jenks Knob—that the tree was in "tolerably good condition, except some burnt places or doty places on the upper side of it."

Rec., pp. 240-241.

O. W. Muller testified in regard to the holly tree:

"Q. 67. Between the slope of Jenks Ridge and the river did you make search for State-line marks?

"A. Yes.

"Q. 68. Did you find any, if so describe what you did find?

"A. I found a holly tree that had some letters and figures on it. It had a figure 8 and then something else after the 8 that might be construed to be a part of the figure 5 or the figure 6, or maybe

something else, just a stem, you couldn't tell, a part of a letter M, three forms of the letter M—the left-hand prong and the next stroke and a piece of the next one, and when I was first along there, there was a tree close to it that had some hacks on it, three hacks on it I think, and the last time I was there the tree was gone.

"Q. 69. What else did you find indicating State line marks?

"A. I don't remember of seeing anything else indicating the State line.

"Q. 70. That holly that you have just described is the first tree that you found with any marks on it after you left the river?

"A. Yes.

"Q. 71. **And passing that and going up Jenks Ridge and up to the top did you find anything?**

"A. **No sir.**

"Q. 72. Nothing to indicate the State line?

"A. **No sir.**

* * * * * * *

"Q. 87. Did it have any other marks than you have described?

"A. Not any. That tree is a mere shell now. The first time I saw it it was only a shell, found some dead wood and that dead wood has decayed more since then.

"Q. 88. After an examination of that tree as a surveyor and from your experience and knowledge of marks, etc., what is your opinion as to that being a State line mark or something else?

"A. From the figures and lettering on that tree, that is on it, it looked as though it was intended for something of that kind, but there was no chance of telling the age of that kind of a tree, a holly or beech is of such a nature in the bark that you can't tell the age of it, and it was only marked in the bark, even if it had gone to the wood you couldn't tell because the wood was decayed and it was hollow. It might have been when I first saw it 15 or 20 years old or it might have been 100 years old, I couldn't tell the difference.

"Q. 89. From its locality and position or any-

thing, was there any reason for judging that to be a State line tree?

"A. It was not on the crest of the ridge as indicated by the report of the commissioners and I could not recognize it as being on the State line.

"Q. 90. The State line calls for a main ridge and thence with the main ridge, etc.

"A. Yes, and then the extreme height."

Rec., pp. 1296, 1297, 1298.

Hale testified, in substance, that the holly tree is 16 to 18 inches in diameter; that when he first saw it in 1896 the west side was dead—the north side had some cuttings on it which might be construed into the letter "M" and the figure, "86," although the "M" and "6" were mutilated (Rec. p. 1165); that the marks might be forty or fifty years old or eighty or a hundred years old—that it was impossible to tell, because of the character of the bark on a holly.

Rec., p. 1166.

Williams describes the holly in substance as did Hale, but he says that the marks looked to him to be thirty or thirty-five years old, and that "if they were put on there during the survey in 1821, they are the plainest marks I ever saw, or anything like that large on any kind of a tree, but I am not familiar with the way a holly holds marks."

Rec., pp. 1435-6.

This holly tree is estimated to be from six to eight hundred feet west of the Tellico River.

The headwaters of Tellico begin five or six miles above the so-called holly tree.

Muller, Rec., p. 1301.

Hale, Rec., p. 1169.

The map of 1821 shows 86-mile circle to be on the extreme height or crest of the mountain, and to the east of the headwaters of Tellico River.

Said map of 1821 also shows that the headwaters begin at the nearest point, according to the scale of said map, about eighty poles west of the boundary line (Rec., p. 1177), while complainant's contention **crosses said stream five or six miles below its headwaters** (Rec., p. 1169), and **where it is a river measuring sixty-six feet** (Rec., pp. 1144, 1169) **between its banks**—in the bed of which, Hale, the witness most familiar with this stream, says (Rec., p. 1178), that he never saw the stream of water less than thirty-six feet wide, even during a period of greatest drought.

So we submit that there is not only no proof in this record to show with any degree of certainty—in fact, there is nothing more than a mere guess—at what time the letter and figures were made on said holly tree, but it is certain beyond dispute that its location is not on the main ridge of the mountain, or the extreme height thereof, so as to conform either to the calls of the Cession Act or the report of the commissioners or the confirmatory acts, or the map of 1821.

As to Marked Trees Along the State Ridge Line.

Not only do the witnesses for the defendant say there are no marked trees between the so-called holly 86-mile tree and Jenks Knob, but this is admitted by Burns.

Rec., pp. 241, 740.

It is true that between the holly and Jenks Knob three other trees are located on Burns' map, complainant's Exhibit D, but these were placed thereon by Gannett, who admits (Rec., p. 485) that he noted whatever trees Fain and Lovingood told him were State line trees.

The Topography of State Ridge.

This ridge or spur on the mountain branches off from the main mountain a short distance west of Laurel Top, and at a point which, on Burns' map, is called County Corners, but slightly below the main mountain at that point—indeed, as stated by Gannett it easily **misleads** one at the point of its departure into regarding it as the main ridge. It gradually lowers as it approaches Tellico River, where it loses itself or is flattened out about a quarter of a mile east of said river—as admitted by Gannett, and at the place where complainant claims the line crosses Tellico River, to use the language of Gannett, "it is quite level for a quarter of a mile **perhaps**."

Rec., p. 465.

Not only does it fail to extend to the river, but it is not even opposite Jenks ridge on the southwest side, as shown by Hale's map, Exhibit No. 1 to his deposition, facing page 1144 of the printed record, and also by the topographical maps exhibited in this cause, one of which appears facing page 406 of the printed record.

Along the top of this ridge for a long number of years, as it is admitted, runs an ordinary wagon road.

And along the top of this ridge the testimony seems to indicate a number of trees apparently bearing State-line marks, some of which are old enough to have been made in 1821, but why it should have seemed necessary to bunch said marks as they appear on this disputed line, as shown by Complainant's Exhibit D, does not appear; certainly nothing like that "bunch" or those appearing in clusters on Slick Rock Creek are to be found on the undisputed boundary line.

It does not appear from the evidence that there are any marked trees around the Tennessee contention along the main ridge.

How the Commissioners May Have Been Misled in Running Down "State" Ridge.

Defendant insists that it is shown by the evidence w great degree of probability, confirmed by the fact that are no marked trees between the so-called holly tree and Jenks Knob (Rec., pp. 241, 740) and the ther fact that the line along the North Carolina co tion **is unquestionably four or five miles west of the ridge**, that said line along the so-called State ridge marked by mistake; that the Commissioners, when reached the point now called County Corners, were **mi** into following said ridge, and perhaps did not discover mistake and that they were off the main ridge of the mo tain until they had passed from said ridge across Te River, where it is likewise probable that they camped the night in the neighborhood of the holly tree.

The testimony offered by defendant bearing on this p is, in substance, as follows:

H. H. Miller, 62 years old when he was examined 1910, and who had lived in that neighborhood practic all of his life, testified that he was a nephew of Joseph Gra who, when he (Miller) was 21 or 22 years old, was an man, more than 70 years of age, and that his uncle him many times that he was a "packer" along with the C missioners, and that while they were endeavoring to k to the main ridge of the mountain, when they came to w is now called State Ridge, there was a thicket, and they w misled into running down that ridge to its "break-off" the Tellico River, and that when they discovered their m take they, the Commissioners, sent him, Graves, and anot man back to cut out the hacks, and that these two "went ba a piece and cut out a piece and said they thought it was fo ishness and a little too much work and sat down," and la on returned to the Commissioners, who made a plat runni

around the headwaters of Tellico, but did not go around and survey that route.

Rec., pp. 984-985.

Miller further testified that in 1871 or 1872 he was out with a surveying party composed of Mr. Seymour, General Jarvis and others, and that with them was a very old man by the name of Isaac Tate, who told him the same thing in substance as he had heard from his uncle Joe Graves.

Rec., pp. 985-986.

John W. Stratton, about 83 years old when he testified in 1940, said that he had lived in the neighborhood of the disputed territory since 1840, when he was a very young man; that for a while he and his parents and grandfather lived on the undisputed State line at what is called Stratton Meadows, where his grandfather was buried; that when he was a boy there was working for his father a man by the name of Levi Mashburn, who claimed to have been one of the chain-bearers along with the Commissioners in 1821, and that Mashburn told him that when the party got to Laurel Top the fog came on thick, and they ran by the gap which leads down to Mitchell's Lick, and thence around to the Mitchell Bald, and were misled into going down what is now called the State Ridge, and when they saw they were wrong they stopped and went across to the mountain beyond Tellico River.

Rec., pp. 1029-1032.

In this connection it is proper to show that Stratton also testifies that his father entered some land in North Carolina **on what is known as Mitchell's Lick**, which is just southeast of County Corners **on the Tennessee contention**, and that a man by the name of Pearcy, surveyor of Cherokee County, was secured by his father to survey out those entries, *and* **that Pearcy would not run any farther than the divide of the waters, stating that that was the State line.**

Rec., pp. 1033-1034.

Further, Stratton's father and John R. Tipton, who was Surveyor General of the Ocoee District, entered a number of tracts of land on the headwaters of Tellico River within the disputed territory. Long before the war Tipton gave to Stratton's father a map of his survey of the lands on the headwaters of Tellico River and to the southwest thereof, which map had been in the possession of the Stratton family ever since. This map was made an exhibit to Stratton's deposition, and is found in the printed record facing page 1036.

Charles Seymour, 67 years old when he was testifying in 1910, stated that he was a lawyer living at Knoxville, Tennessee, and at the beginning of 1865 he had charge for non-resident owners—the Wetmores and Stevensons—of a large number of tracts of land owned by them in Monroe County as privies in title to the original grantee, Francis W. Lea.

He also states that in the latter part of the '60s and early '70s he did a good deal of surveying himself in order to familiarize himself with these lands, and that in 1871 he spent five weeks on Tellico River with General Jarvis, of Ohio, and some others, and while there he became acquainted with Joseph or Sol Graves—he is not certain about the name—and also a man by the name of Brannam; that both Graves and Brannam were very old men and claimed to have been with the Commissioners when the line was run and took a great deal of pride in talking about it.

The statements of these two old men to Seymour corroborates the statement of Joseph Graves to his nephew H. H. Miller, and of Levi Mashburn to John W. Stratton, as shown above. Mr. Seymour gives the substance of what these old men told him, as follows:

> "A. These two old men both told me the story over and over, it was the only thing in their lives they thought would interest me, that they were present at the making of the important survey, and more important one than the one we were making, and that it was the original survey of the State line, at

which they were present, and made by a large party of men they said, and that the party **came along the Hang Over**, and they followed the line along the divide of the mountains until they reached a point where the fog came on, and it was towards night, and they took the first turn down to get a place to camp where there was water, and they followed the ridge down to the river and camped there for the night, and the next morning, finding they were down in a hole they went to the top of the mountain further west, and sent a man back to tell the marker who was sometimes a long distance behind them, to stop marking, and that they said they would plat out the mountain around as it was, and would go on and they went on to the southward, the Graves brothers claimed to have been with the surveyors at that time they were running the line between the States from the Little Tennessee River to the Hiawassee. But I had not discussed with them where the line ran at any of the points of it except their telling me about there being some marked trees one a holly at the place where the parties camped. They said they sent back men who went around the mountain and reported the shape of it, and those men did not get in until after they had passed the turnpike where the Graves left.

"Q. 45. What ridge was it did he say that party came down on, according to these men in their declarations to you?

"A. It was a ridge between the headwaters of Tellico and one of the prongs called by some Rough Creek and by others I think Indian Creek.

"Q. 46. And that came to be called the State Ridge?

"A. Since this litigation sprang up it has been called the State ridge universally.

"Q. 47. On what waters did they camp, did he say?

"A. They said where they crossed the main Tellico River. He took one of our party, either a surveyor or one of the assistants, or he sent a local man there I think one of the Miller boys or an older man known as Buck Miller a preacher to show them the place so they could find this point which was a notable camp, with fine water and a good place for a camp.

During that survey they subsisted mostly on game. In 1871 I found sufficient for supply of our party of eleven.

"Q. 48. You say that he said when they discovered they were under the main ridge they sent back a man to stop marking and strike out the marks they had made?

"A. They said so most distinctly. And they said the marker was sometimes a day behind the rest of the party."

Rec., pp. 1149-1150.

If the Commissioners, **misled** into passing down the State ridge, **discovered** when they reached or crossed Tellico River **that they had departed from the main ridge**, what is more reasonable than that they would stop the marking and send some one back to obliterate the marks which had been made? Would not this action have been reasonable on their part?

And does it not also account for the **absence of trees bearing State-line marks between said holly tree and Jenks Knob?**

And here it is to be noted that even Burns and Gannett do not claim to have found a tree bearing State line marks between Jenks Knob and a point some five miles and a half southwest thereof, as shown by the Burns-Gannett map, Complainant's Exhibit D.

We have already pointed out that in Stevenson *vs.* Fain (116 Fed., 150), Judge Lurton states, and the map therein relied on by the North Carolina claimants show, that the line ran from the holly 86 mile tree, not to Jenks Knob, as now claimed, but to Bryson's Gap, about a mile west of said Knob.

We now desire to call to your Honors' attention one bit of remarkable testimony offered by complainant, seeking to establish this line along by the holly tree by reputation or tradition, contributed by one Dr. Patton, who was examined in the case of Hebard *vs.* Belding, and whose testimony is incorporated in this record. He states that when he was a

young man one Tatham, who claimed to have been along with the Commissioners, told him that the line ran westwardly along a ridge from Laurel Top to Tellico River—that it crossed said river and on the west bank thereof a holly tree was marked "Tenn." on one side and on the other "N. C.", and that from said tree the line ran not to Jenks Knob or Bryson's Gap, **but to Beaver Dam Bald,** two miles southwest of Jenks Knob, as shown on complainant's Exhibit D.

Rec., p. 868.

He says that in 1867 he saw this tree, and that in addition to the "Tenn." and "N. C." it also had on it an "M" and "83" or "86." He says that he thinks Graves told him that it was marked "M 83," but he cannot be certain whether the marks that he saw were "M 83" or "M 86."

Rec., pp. 868-870.

Were These Two Holly Trees Marked "86 M"?

Certain it is, that the holly tree described by Gannett and Burns and all of the witnesses in this cause, show no indication of ever having had on it the "Tenn." or "N. C." as described to Patton by Graves, and, further, it is unquestioned that the North Carolina contention does not run from the holly tree to Beaver Dam Bald, but to a point two miles northeast thereof, to wit, Jenks Knob—so these trees are not only differently marked, but the lines therefrom run to different places.

We have already shown that the map of the Tellico part of the Ocoee District shows that the lands were sectionized up to the main ridge, and that just east of the sectionized land the words "**N. Carolina**" appear—this is not the case at Slick Rock, though the map was made by the same man.

The holly tree is not the right distance from well-known and undisputed points on the Boundary Line to be the 86-mile tree.

Burns testifies in regard to this part of the dispute that he tested the map of 1821 and the report of the Commissioners with his survey "and the result was surprisingly accurate"—that "I got surprisingly close results in every test I put it to and in every way" (Rec., p. 259); and so he reached the conclusion that the line crossed the Tellico River, and he would have the inference drawn from his statement on page 252 of the printed record, that the holly tree was only .06 of a mile off the distance called for on the map.

We will now show to the court the latitude Burns allows himself in making the statement that the map of 1821 and the distances shown thereon are surprisingly accurate tests by his actual survey.

It is to be borne in mind that where the boundary line reaches the Unaka turnpike road at the southwest end of Unaka Mountain, the report of the commissioners calls for a distance of 101 miles, so that according to complainant and Burns, the 86-mile tree ought to be **exactly 15 miles northeast from the** Unaka Turnpike. The point where the boundary line reached said turnpike is well known—is admitted in this record, and it was at that point that Gannett began his survey northeastwardly along the crest of the mountain.

Defendant had Mr. Gannett exhibit with his cross-examination the notes of this survey. They begin on page 539 of the printed record, and the point where they reach the holly tree under the guidance of Jasper Fain is noted on page 543 of the record. The distances covered by this survey aggregate 86,143 feet, that is, about 16 1/3 miles. So that said so-called 86-mile tree is **not only more than a mile off of the crest of the mountain,** where it should be according to the map of 1821, but **is wrong for distance** measured along the uncontroverted boundary line northeast from the

undisputed boundary on the Unaka Turnpike, to the extent of one and one-third miles.

As said by this court in Ayres *vs.* Watson, 137 U. S., 584, 590: "The footsteps of the original surveyor may be traced backward as well as forward," and how much fairer it would have been to both parties to endeavor to test the location of this 86-mile tree from the **undisputed** point on the Unaka Turnpike than to rely upon a measurement from **disputed** points, and on marks the age of which, and by whom made, cannot at this time be established with any degree of certainty.

At this point we call attention to the fact that Mr. Gannett admits that he followed the uncontroverted boundary line along the crest of the mountain from the Unaka Turnpike to Jenks Knob, and there instead of continuing on the main ridge, as he should have done, under the authority of Ayers *vs.* Watson, *supra*, which would have carried him around the Tennessee contention by Mitchell's Bald, he followed without question Jasper Fain off of the main mountain at Jenks Knob down to this holly tree.

Rec., p. 462.

He further admits that when he went over the maps that he had examined he was under the impression that the line ran around the main ridge—the water shed, but he made no effort whatsoever to confirm the truth of what he had learned from said maps, but followed unquestioningly Jasper Fain down off the main ridge.

Rec., pp. 510, 509.

Further, McLelland, one of complainant's witnesses hereinbefore referred to, and who made the survey in 1893 under the direction of the attorney for the Fains, admitted that in his running from the Unaka Turnpike that, if he had not been directed off of the main mountain by Fain to that holly tree, in order to conform to the calls of the Cession Act and of the North Carolina Act of 1821, he would have continued

on the crest of the mountain, and have gone around the main ridge by way of McDaniel Bald, and thus around the headwaters of Tellico River.

Rec., pp. 598-599.

And, further, we here point out, as we should have done in discussing McLelland's testimony in connection with the controversy at Slick Rock, that he testified in effect that if he had followed the main ridge from the point called Junction to the Tennessee River he would have gone by way of Stratton Bald.

Rec., p. 603.

It will be remembered, as we have stated, McLelland began his survey at Unaka Turnpike—that he claimed to have made it accurately, and that at the end of each mile he placed a mile stone, and he testified that the stone placed by him at the end of 15 miles from the Unaka Turnpike bore on it 86 and 15, that is, 15 miles from Unaka Turnpike and 86 miles from the Cataloochee Turnpike, and while he could not remember whether this stone was on top of the mountain (Rec., p. 586), and could not recall whether it was as much as a mile and a half away from said holly tree, he does say: "**I know it was not near the tree.**"

Rec., p. 587.

Williams and Hale found this mile stone erected by McLelland bearing the figures "86" and "15," and it is pointed out on the map "BB" exhibited with Williams' deposition, facing page 1558. Williams testified that said stone was on top of the main ridge of the mountain, about one and three-quarter miles from the alleged holly 86-mile tree.

Rec., p. 1559.

Hale, Rec., p. 1629.

This 86-15 milestone, erected by McLelland, is located on Exhibit "B" to this brief, according to the testimony of Williams and Hale.

Tennessee has exercised jurisdiction over the disputed territory around the headwaters of Tellico River since 1837.

1. By surveying and platting the same as a part of her Ocoee District.

Map, Rec., p. 1158.

2. By issuing grants for said lands beginning in 1842.

Rec., pp. 1050, 1055, 1074, 1158.

3. By selling said lands for taxes.

Rec., p. 1054.

4. Through her Chancery Court of Monroe County, in the cause of Wetmore *vs.* Stiles and others—an injunction and ejectment suit, involving the lands around the headwaters of Tellico.

Rec., pp. 1160, 1235-1239.

JONES COUNTY, TENNESSEE.

By chapter 193 of the Acts of 1844 (Rec., p. 1259) Tennessee created out of parts of Monroe and Blount counties a new county by the name of Jones, and that part of the description of the boundaries of said new county contained in the concluding clause of section 1 of said act as follows: "Thence up the main south branch of said river (Tellico) to the head, a distance of 21 miles to the North Carolina line," would reach the main ridge on the mountain east of the headwaters of Tellico, as the boundary line between North Carolina and Tennessee.

Rec., pp. 1168-1259.

If the Commissioners had intended the boundary line to cross the Tellico River that fact would have been noted in their report and upon their map.

All of the surveyors examined in this cause—even Burns and Gannett—admit that if a stream like the Tellico River—66 feet in width, or even less—be crossed by a boundary line in making a survey, the report of and plat showing the line as run should show and plainly indicate such a stream. But the experts of complainant, while admitting that the report and map should refer to and show the crossing of Tellico River, if it were intended to establish that line as the boundary line between the States, and thus drag that line away from the main mountain, as called for in the Cession Act, nevertheless they seek to account for that omission by saying that the survey and map bear inherent evidences of having been hurriedly made.

We conclude that said survey was hurriedly made—that except for an endeavor to **follow the calls of the Cession Act and ascertain the main ridge of the mountain,** that it was not accurately made, and that said map, aside from showing that the line was run in accordance with the streams it touched, **is little more than a sketch.**

But if the Commissioners **crossed** Tellico they certainly made a note of it, as they did Cane Creek, at whose mouth they crossed the Hiwassee River, and inasmuch as this map, sketched though it be, was not too hastily made to show so small a stream as Cane Creek, and also the crossing of a smaller and unnamed creek south of the Hiwassee River, is it not reasonable to conclude that if the Commissioners had intended to adopt a line crossing the Tellico River that they would have shown that fact and not reported a line along the crest of the mountain, and altogether east of the headwaters of said stream?

That they were acquainted with the location of Tellico River, and that it had different forks or heads, is shown not only by the stream so named sketched on the map of 1821, but the report of the Commissioners calls for "the head of the west fork of Tellico River," near where they reached the old trading path leading from the valley to the overhill town.

Rec., p. 44.

If they had deemed this passing **near** the west fork of Tellico River of sufficient importance to mention that fact, is it reasonable to conclude that they would have omitted any reference to **crossing** the main body of Tellico River four or five miles below the headwaters thereof—if, in fact, they had so **crossed** that stream and **adopted** that line as part of the boundary?

Distances indicated on said map inaccurate and do not conform to actual surveys.

We have repeatedly challenged the general statements of Burns and Gannett to the effect that even as to distance said map of 1821, tested by their surveys, was surprisingly accurate. We have shown how inaccurate was their test and claim that the so-called Holly 86-mile tree is just 15 miles from the Unaka turnpike—that they were wrong

just 1¾ miles—or the map was wrong, and it is immaterial which.

We might point out any number of places in the record, as we did on page 1221, showing discrepancies in distance between points on the undisputed boundary line between the 59th-mile tree and the river, but we need only to refer to the testimony of C. B. McNab to demonstrate the utter inaccuracy of the distances apparently indicated on said map.

C. B. McNab, who was never employed by any of the private claimants of the lands in controversy, was for many years county surveyor of Cocke County, which borders on North Carolina, and in connection with his official engagements and private practice he had surveyed the entire boundary line from the Cataloochee turnpike to the 50th-mile tree, and in that distance had found several of the original mile trees still standing—that the distances between said mile trees varied, usually measuring out somewhat more than a mile.

Rec., pp. 1516-1522.

Further, Mr. McNab stated that from the Cataloochee turnpike to Meigs' boundary line, a well-known and undisputed point called for in the report of the Commissioners as being 31½ miles from said turnpike, the survey was approximately accurate, but that between said Meigs' boundary line and the 50th-mile tree, which should have measured out only 18½ miles, the actual survey showed the measurement to be 3.01 miles more than 18½ miles—that is, at the 50th mile tree instead of the measurements showing 50 miles he had actually run 53.01 miles, practically all the gain being west of the Meigs boundary line.

Rec., pp. 1522-1523.

Recurring again to the opinion of the Court of Appeals in Stevenson *vs.* Fain, 116 Fed., 151, it is to be noted that Judge Lurton said that the so-called holly was shown to be

86 miles from the beginning of the survey at the Cataloochee turnpike, and that there was also evidence which showed that the point on the Unaka turnpike marked by a stone and called for in the act of 1821 as being 101 miles from Cataloochee turnpike was shown "by actual survey following the line marked on the ground * * * to be nearly 101½ miles, if the State Ridge be followed at the disputed place in the line."

We have already shown that said holly 86-mile tree is not 15 miles from the Unaka turnpike, but 16¼ miles therefrom. We know not how it was made to appear that said holly was 86 miles from the **beginning,** or by whose survey it was shown that the stone where the line reaches the Unaka turnpike was 101½ miles from the Cataloochee turnpike, but we do know that there is no such evidence in this record, and, inasmuch as the same Fain who was a defendant in Stevenson *vs.* Fain is a witness in this cause and very active in furnishing testimony, is it not but fair and natural to infer that if there had in fact been such a survey it would have been offered in evidence in this case?

Moreover, it does not appear by what route immediately south of the Tennessee River such survey was made—that is, whether said survey followed the Hangover Lead and Ridge or went up Slick Rock Creek—but inasmuch as Stevenson *vs.* Fain was decided by the Court of Appeals only about two years after Hebard *vs.* Belding, we submit that if the measurement referred to by Judge Lurton in Stevenson *vs.* Fain had followed Slick Rock Creek that very fact would have caused him to question its accuracy and *bona fides*, inasmuch as in Hebard *vs.* Belding he had found the line to be along the Hangover Lead or Ridge.

There must have been some remarkable evidence, not only in regard to the alleged blocking of the holly tree, but also as to distance, in Stevenson *vs.* Fain, because what in some way was made to appear to the Court of Appeals in respect of these matters is shown by the evidence in this case not to be in accord with the facts.

McNab's testimony, hereinbefore referred to, shows a error of three miles in distance along the undisputed lin north of the river, and it is to be noted that this testimon of McNab's is in no way controverted or attempted to b controverted; indeed, he was not even cross-examined i this case.

The So-called Davenport Notes.

Finally the complainant, in her endeavor to drag th boundary line away from the main mountain where sh placed it by her Cession Act of 1789, relies upon what i claimed to be a **copy** of the field-notes made by Willian Davenport, the surveyor for North Carolina, in 1821.

A copy of said so-called field-notes is found betwee. pages 624 and 634 of the printed record. We understand that the book from which the copy exhibited was made will be submitted to the court on the trial of this cause.

While a casual glance at the notation on said book and the heading above the so-called field-notes might leave the impression that it purported to be a book of original entry, nevertheless, the proof shows that at most the so-called notes written down therein are not original entries made contemporaneous with the survey, but are copied from something else, and they appear to have been copied in ink partly by William Davenport, but principally by his wife. We submit that a mere copy, not made at the time of the acts and doings to which it refers, and in all probability made years later—at least it must have been made some time after Davenport returned from the survey—is not competent evidence in this cause, and for that reason should not be considered by the court.

But even of said field-notes should be considered by this honorable court to be competent as evidence, we respectfully insist that, in view of the report and map made by the Commissioners, the so-called notes referring to that part of the boundary line now in dispute were not followed and

adopted by the Commissioners in their report or the maker of the map of 1821, which purports to have been signed by Davenport.

Indeed, we submit that neither Armstrong nor Davenport could have intended to follow said notes in the making of said map of 1821, because the inconsistency between the map and said notes at the points in dispute is manifest.

Before entering upon a discussion of said notes and the testimony relating thereto it is not improper to refer to—

How the So-called Davenport Notes Were Discovered.

The same Mr. Cozad who, with Mr. W. R. Hopkins, had engaged to bear the expenses of this suit employed a prominent North Carolina lawyer, related to the Davenport family, to ascertain whether there were any field-notes, etc., among the papers in the hands of William Davenport's heirs, and Mr. Cozad testifies that having "reason to believe they had found the field-notes" he went to Lenoir on January 7, 1911, and received from Edmund Jones, a brother of Wiliam Davenport Jones, grandsons of William Davenport, what he (Cozad) calls "a certified copy of the field-notes of 1821 of William Davenport in that survey," and that he was informed by Edmund Jones that the so-called Davenport notes had been finally "found by them in Davenport's *old secretary* in a blind drawer they had overlooked to this time."

Rec., p. 1540.

Mr. William Davenport Jones testified in substance that his grandfather, William Davenport, had an old secretary writing desk (or sideboard) where he kept his valuable papers, and that he had often seen him turn down the lid or shelf of this desk and write on it, and that at the instance of Judge Avery he had made several searches for papers relating to the boundary-line survey without finding anything, but that on November 10, 1910, Ned Jones came to

his house, and in a little drawer, which he says he m
have overlooked before, he found lying right before
eyes a little book marked "Field-notes of William Davenp
1821," along with a number of other papers; that he h
seen his grandfather, William Davenport, at that d
handling papers many times during his lifetime, but h
never seen the book containing the so-called field-notes un
he discovered it **on November 10, 1910.**

Rec., pp. 606-609, 615.

He states that this "writing desk" had been in his gran
father's house, in which he, the witness, was then livin
ever since the death of his grandfather.

Rec., p. 607.

Now, after Mr. Jones had testified in regard to the han
writing contained in the so-called field-note book, Mr
Emma Harper Cilley was also offered as a witness by co
plainant to prove the handwriting therein, and she, amon
other things, testified that her grandmother was the amam
ensis of her grandfather, and she describes the "secretary
or writing desk, and then also described "a large walnu
sideboard" which was in the Davenport house.

Rec., p. 636.

She also said that she did not know what her grandfathe
was accustomed to keep in the sideboard, but that there wa
a great deal of handsome cut glass on it, including a cut
glass decanter usually filled with French brandy, and ther
was also a dish of sourwood honey on the sideboard; tha
as to the inside of the sideboard she could only say that they
kept table-cloths and things of that sort in a large drawer
and that in the lower part "they had beautiful china—old
fashioned china, of course."

Rec., p. 638.

That the so-called **writing desk "secretary"** was an entirely **different piece of furniture from the Davenport sideboard** is made manifest by Mrs. Cilley, and she testifies positively that the **secretary or writing desk had been away from the Davenport house thirty or thirty-five years**; that for at least that time it had been in the house of Edmund Jones.

Rec., pp. 640-641.

So it is manifest that the so-called secret drawer in the secretary or writing desk of William Davenport could not have been found to contain anything **at the home of William Davenport Jones** on November 10, 1910.

Mrs. Cilley further testified that while she was at the home of William Davenport Jones **on November 10, 1910, neither he nor Edmund Jones said anything whatsoever to her about the discovery of the Davenport field-note book.**

Rec., p. 640.

The Handwriting in the So-called Field-note Book.

William Davenport Jones testifies that the first three pages of the book, beginning with the words "July 19, 1821," and ending with the words "Tuesday morning," are in the handwriting of William Davenport.

Rec., pp. 611, 624.

That beginning on the third page with the words "birch at the sixth mile" (Rec., p. 625) to the top of the 16th page of said book, ending with the words "72 miles on said line" (Rec., p. 633), which words are at the close of the field-notes, the handwriting is that of Mrs. Davenport.

Rec., p. 611.

That the words "and runs south 320 poles" (Rec., p. 633) are in the handwriting of William Davenport.

That the words "the wagon road, the 101 mile" (Rec., p. 633), are in the handwriting of William Davenport.

Rec., p. 611.

That the words "the end of the Unicoi Mountains" (Rec., p. 633) are in William Davenport's handwriting.

Rec., pp. 611-612.

That the words "thence south 15 miles and 220 poles to a post oak on the Georgia line 23 poles west of the 72nd mile from the Nickajack old Town on the Tennessee river" (Rec., p. 633) are in the handwriting of Mrs. Davenport.

Rec., p. 612.

That the words "notes compared to this place," which are immediately under "chestnut tree 52nd mile" (Rec., p. 629), are in the handwriting of William Davenport.

That the words "which is at an old gap at the head of Big Creek of Tennessee, and if there is a wagon road through the Big Smokies Mountain it must go through this gap" (Rec., p. 627), are in the handwriting of William Davenport.

These words just quoted, it appears, are part of the marginal paragraph in connection with "Balson Pine 29," etc., on page 627 of the printed record, and are interpolated on the margin of a page where all of the writing save that quoted is in the handwriting of Mrs. Davenport. And here we call attention to his statement that all of the "courses and distances from the 25th mile to the 29th mile, inclusive" (Rec., pp. 626-7), are crossed out.

Rec., p. 617.

The book is not before us, but we apprehend that the heavy line in black at the bottom of page 627 of the printed record, indicating that the matter to that point had been crossed out, must be a mistake, and that said line should

follow immediately after the words "Wrong, I suppose." "Wrong," about the middle of the page.

The words "Wrong, I suppose," and "Wrong" (Rec., p. 627) are in the handwriting of Mrs. Davenport, and are on the margin opposite the crossed-out notes—that is, opposite the notes calling for the 26th, 27th, 28th, and 29th miles.

Rec., pp. 617, 618.

Now, immediately below the notes calling for the miles crossed out, we find other notes calling for the 26th, 27th, 28th, and 29th miles (Rec., p. 627), **which are not only different as to course and distance, but call for different kinds of mile trees.**

Rec., p. 626-627.

We will not encumber this brief with all the differences between the courses and distances of these supposedly same four miles set out on pages 626 and 627, but only mention a few of them, to wit:

It will be noted that the last call in the notes supposed to represent the 26th mile (crossed out) are south 70 west 60 poles, **Balson Pine** 26 miles, while the last call in the substituted notes supposed to cover the 26th mile are south 70 west **160** poles, **spruce, pine** and **birch** 26 miles.

Rec., pp. 626-627.

There are five separate calls for courses and distances covering the alleged 27th mile (crossed out), while there are only three in the substituted mile.

Rec., p. 627.

That the concluding call for the 28th mile, as struck out, is north 50 west 160 poles, **spruce pine** 28th mile, while the call substituted therefor is **south** 80 west 140 poles **beech** 28th mile at the head of the southwest fork Lufty.

Rec., p. 627.

That the last call in the 29th mile is north 80 west 180 poles, Balson Pine, while in the calls substituted therefor it is **south** 30 west 80 poles, **beech,** 29th mile, Indian path at the head of Deep Creek.

Rec., p. 627.

Now which set of calls is correct, as conforming to the paper from which Mrs. Davenport was copying, the evidence does not disclose—indeed, no one can say, and evidently Mrs. Davenport was in doubt when she endorsed on the margin, "Wrong, I suppose."

Mr. William Davenport Jones also admitted that the ink appearing in this little book was in some places dimmer than in others, and it is manifest from his testimony and description of the handwriting in the book that the writing was done not only by different persons but at different times, and probably from different papers.

Further, it would be interesting to know with what notes William Davenport had been comparing those copied when he wrote just under the words "chestnut tree 52 mile"—"**notes compared to this place.**"

Rec., p. 629.

Further, it is difficult to understand why if Mrs. Davenport was copying from the original notes as made by her husband at the time of the survey, she did not include in her copy the number of interlineations therein and additions thereto, interpolated by him at different places in the book, and especially toward the close of what purports to be the field notes.

It is shown that the last part of the field notes is in her handwriting, and, therefore, must have been made before the interlineations and additions appearing in the handwriting of her husband.

In the absence of the book itself, it is difficult to comment further thereon, and we will not attempt to do so from

mere recollection of its appearance gained during the examination of the witnesses more than two years ago.

However—

The so-called Davenport notes do not conform either to the report of the Commissioners or map of 1821 at the disputed points in the boundary line.

If anything were needed to demonstrate that the lines along the North Carolina contention at Slick Rock and Tellico River, if marked at all in 1821, were mere tentative lines not **adopted** by the Commissioners **in making up their report and map,** it is to be found in these so-called Davenport field notes.

So far as the record shows, after the discovery of the alleged Davenport field notes, Burns, the expert of Messrs. Hopkins and Cozad, was turned loose thereon to exercise his ingenuity in making comparative maps, and he did make and file as complainant's exhibit BB (Rec., p. 644) what he labeled "second comparative exhibit of the State line between North Carolina and Tennessee from the 59th mile tree to the 101st mile tree," which purported to make a comparison of four lines, the first of which he called "tracing the line settled, run and marked by the commissioners of 1821, as shown by their plat"—which he said was a mere tracing of the map that the commissioners made in 1821.

The second comparative line he said was a plat of the line as claimed by North Carolina surveyed by himself and Gannett.

The third, he said, was a plat of the line claimed by Tennessee, as surveyed by himself and Gannett.

And the fourth, he said, was a plat which he made in his office from the so-called copy of the Davenport field notes.

Rec., p. 644.

This comparative exhibit—complainant's exhibit BB, was evidently intended and expected to be crushing upon the

contention and to the hopes of Tennessee, but doubtless for the reasons hereinafter shown, **complainant did not have that map printed.**

Burns testified positively and unequivocally that there was practically no difference between the plat made from the alleged Davenport field notes and the contention of North Carolina, as surveyed by him and Gannett.

Rec., pp. 644-645.

It is hardly necessary to say that if there was no difference between the plat made from the Davenport field notes and the plat made of the North Carolina contention from the actual survey of Burns and Gannett, the courses and distances of the two must have been practically identical.

Further, he testified, presumably, we submit, to clinch matters, that the so-called Davenport field-notes or the plat made therefrom "tallies almost exactly" with the Commissioner's map of 1821—he first said he found only two differences between the Davenport notes and the map of 1821, but later he added another difference.

Rec., pp. 646-655.

This witness was merely making an argument for his employer, and that, too, without regard to the facts.

It is not necessary to show in detail all of his perversions of facts to demonstrate his entire unworthiness—a few of his perversions and mis-representations will be sufficient to that end.

First, the so-called Davenport notes called for crossing the Tennessee River (Rec., p. 630) a straight line for a mile—that is, south 75 west 320 poles, while in the North Carolina contention, if Burns' map is made according to his survey (Rec., p. 665), there are at least two north calls and the line reaches the river on a course of south 49 degrees and 21½ minutes west (Rec., p. 665), where the line passed through the marked hemlock fore-and-aft tree pointing, of course, the same course across the river as Tennessee con-

tends the line should run, but at said marked fore and aft tree the line as surveyed and **now** contended for North Carolina, instead of crossing the river on the same or any other course, **abruptly turns at an acute angle and runs down the river.**

Rec., pp. 665-666.

May we not respectfully challenge the accuracy of this expert's testimony to the effect that there is practically no difference between the so-called Davenport field-notes and the North Carolina contention as exhibited by Burns' survey?

The next call in the so-called Davenport field-notes, called to Burns' attention, was the first call after crossing the river, south 80 poles "up said creek," and Burns testified that that would tally almost exactly with the course of Slick Rock Creek and the course of the North Carolina contention, as run by him.

Rec., p. 645.

However, on cross-examination he was compelled to again disclose the notes of his survey of the North Carolina contention, which at that point follows the course of Slick Rock Creek, and it appeared that the first eighty poles up Slick Rock Creek, according to the North Carolina contention, instead of being on a due south line, was southeast part of the way, and southwest the other part, and some if it as much as thirty degrees off of a due south line.

Rec., p. 667.

The next call in the Davenport field notes (Rec., p. 630) is south 40 west 80 poles, called to Burns' attention on page 647 of the printed record, and he testified that that "corresponded pretty close" to his running of the North Carolina contention, but part of that line, as shown by Burns' own field-notes, instead of being on a southwest course is south 4 degrees and 26½ minutes east—practically 45 degrees off or away from the call of the Davenport notes.

And so he goes on through the contention at Slick Rock, claiming, insisting, and testifying that there is practically no difference, not only between the so-called Davenport field-notes and his survey, but, as hereinbefore stated, between said field-notes and the map of 1821.

Rec., pp. 648-650.

Though with great reluctance he confessed that he had never been able to find any mile-marked tree—any mile tree—along Slick Rock Creek.

Rec., p. 650.

It is to be borne in mind (other questions aside) that the determinative question is not whether there may have been a line run up Slick Rock Creek in 1821 by Mr. Davenport or some one else, but whether that line was the one **adopted by the Commissioners and so reported and shown in their report and their map of 1821.** Mr. Burns fully understood that this was the question, and hence he was testifying that the so-called Davenport notes "tallied almost exactly" with the map of 1821, and when his attention was directed to the Davenport calls covering the 68th and 69th miles, he pronounced the resemblance striking.

The last course and call of the 69th mile in the Davenport field-notes is south 35 west 120 poles to a maple on the **east** bank of said creek (Rec., p. 630), and Mr. Burns was compelled to admit that the map of 1821 showed the 69th-mile circle or mile tree not only **not on the east bank** of any stream, but a mile and three-quarters to the west of the stream marked "Creek" on the map of 1821, just east of the **boundary line.**

Rec., pp. 677-678.

The so-called Davenport notes place the end of the 70th mile on the **west bank** of a creek (Rec., p. 630), but the map of 1821 shows the 70th-mile circle on the **crest of a mountain,** more than two miles west of the stream marked "Creek"

(Rec., p. 678), **and,** as we have shown elsewhere, **just about the right distance from Cheoee River.**

Further, this expert testifying to the practical accuracy of his work, and that there was no difference between the map of 1821 and the Davenport field-notes, was forced to admit on cross-examination that his sketch number 4 on his comparative map, so far as it related to the stream marked "Creek," just south of the Tennessee River, was not based upon any survey at all, and that in making that comparative map he platted the courses and distances contained in the Davenport field-notes south of the river, and then **arbitrarily** sketched or drew lines intended to designate a creek into the line thus made by platting the courses and distances of said Davenport notes—and he put that stream which he says is Slick Rock Creek into the plat of the Davenport notes without regard to any survey made of said creek, and without regard to how it actually runs on the ground.

Rec., p. 673.

Further, as to the surprising resemblance and practical tally between the Davenport notes and his running of the North Carolina contention, we call to the notice of Your Honors that the last call in the mile south of the river (according to the Davenport notes) is due west 60 poles—the equivalent of that in Burns' survey is north 73 degrees 37½ minutes west, or 16 degrees 22½ minutes off of a due west **line.**

Rec., p. 675.

As noting the "close resemblance" and "practically exact tally" between the Commissioners' report and map of 1821, we call to the attention of Your Honors that said report (Rec., 52) and said map call for the Equonettly path at the 53-mile tree, while the Davenport notes call for that path at the 54th-mile tree.

Rec., p. 629.

The call for the 60th-mile tree is at the path from Equonettly to Tellassee (Rec., p. 629), and the proof is to the effect that what is now a turnpike road leading from Tellassee, in Tennessee, into North Carolina is understood to run along that old trail or path (Rec., pp. 459-663-672), but Burns testifies (672) that said turnpike is about 1½ miles from where he fixed the location of the 60th-mile tree, which is not now in existence, or was not found, and by actual measurement it is shown that said turnpike is 2,060 feet over two miles from the 59th-mile tree, which was found (Rec., pp. 459-1455); so that if said old trail now is occupied as a turnpike road it is a mile and a half away from the 60th-mile tree.

The last call in the 72nd mile or to the 72nd-mile tree, as called for in the Davenport notes, is south 30 west, which Burns admits in making up sketch number 4 of his Exhibit "BB" he converted into south 30 east—and he further admits that running the line as called for in the Davenport notes south 30 west 80 poles would have ended a quarter of a mile down on the west side of Fodderstack Ridge toward Tellico, and have thrown the entire remainder of the line away from the course not only of Fodderstack Ridge, but the main mountain.

Rec., pp. 675-677.

Tennessee was somewhat handicapped in cross-examining Burns in the relation of the Davenport notes to the Tellico contention, and his insistence that there was great resemblance between the map of 1821 and the so-called Davenport notes or the plat made therefrom, because in reproducing, as he claimed to have done, said map of 1821 on said Exhibit "B," as "number one" thereon he entirely omitted to show any part of the Tellico River thereon—that is, he failed to show that the headwaters of the Tellico River according to the map of 1821 began just west of the boundary line between the States.

Tennessee, through her counsel, asked him to trace the headwaters of the Tellico River on Exhibit "BB," plat number 1, as the same appear on the map of 1821, but North Carolina, through her counsel, refused to permit him to do so.

Rec., pp. 659, 681.

But finally defendant succeeded in purchasing a copy of said map Exhibit "BB" to Burns' Deposition, which will be hereinafter further and specifically noticed.

Burns gave as a lame excuse for not putting on the headwaters of the Tellico River on sketch number 1 (Exhibit "BB") because, as claimed by him, the purpose of that was to show only the lines and not the topography, yet he did sketch in the stream marked "Creek," east of the line.

Rec., p. 660.

The Davenport notes (Rec., p. 632) call for the 86-mile tree as follows: "South 60 west 320 poles, holly tree 86 mile, **near the head** of the middle fork of Tellico River."

Now the "head of a stream" called for in a boundary means the source of the largest branch, unless general reputation has given the appellation to another.

Davis *vs.* Bryant, 5 Ky., 110, 113.

Next, **it is to be noted** that although said notes referred to a small stream as Cane Creek at the mouth of which the line crossed the Hiwassee River, nevertheless, no mention is made in this call of **crossing** the Tellico River, and the fair construction of the words "holly tree 86 mile near the head of the middle fork of Tellico," would place that tree above the headwaters, and certainly a surveyor in **crossing** a stream 66 feet wide would have noted that fact.

The holly tree claimed by North Carolina to be the 86-mile tree is not only on a line which **crosses** a river, but it is from **five to six miles below the head of that river.**

Further, it is to be noted that this call in the Davenport

notes reaching this holly tree as the 86-mile tree, is a straight line for one mile—south 60 west 320 poles—now, we call to Your Honors' attention the mile just east of the alleged holly tree, according to the North Carolina contention, as actually run by Burns and Gannett—the notes for which appear on pages 679 and 680 of the printed record.

These notes show not only a very crooked line, but that many of its courses or degrees are nearly at right angles to the course or degrees of the 86 mile as given in said Davenport notes.

Burns reiterated (Rec., p. 655) that there were only three places on which the Commissioners' map of 1821 differed from the Davenport field-notes and the plat thereof exhibited by him. However, he was compelled to admit that the 68th, 69th and 70th mile circles, as shown on the map, do not conform to the Davenport notes calling for trees on the banks of a creek.

Rec., pp. 687-688.

S. S. Gannett again:

Mr. Gannett, several months after the discovery of the alleged Davenport field-notes, to-wit, in May, 1911, was recalled by complainant for examination thereon, and he was shown the book containing the so-called Davenport notes, and he testified that the first time that he ever saw that book was on April 29, 1911, when he examined it very carefully

The book was not important except for its contents, and it is manifest that the inference or suggestion sought to be made by Gannett was that on Saturday, April 29, 1911, he first became acquainted with the contents of that book, but he was compelled to admit on cross-examination that prior to his cross-examination in Washington on January 20, 1911, D. R. Burns had sent him a copy of said field-notes, and he was examined in relation thereto by one of the special counsel for North Carolina.

Rec., pp. 692-700.

This witness also sought to leave the impression that the course of the line on the crossing of the Tennessee River, as claimed by Tennessee, is south 30 west (Rec., p. 693), when his and Burns' notes show that the course of the line running through the marked fore-and-aft hemlock tree on the north bank of the Tennessee River and pointing directly across the river is south 49 degrees 24½ minutes west (Rec., p. 665), and this Gannett was finally induced to admit.

Rec., p. 701.

And to show the length to which Mr. Gannett was willing to go, or the inaccuracy of his statement, he seriously contended that the Davenport field-notes called for a line **following up the creek for five miles** (Rec., p. 705), when the only call for up the creek is limited to 80 poles—that is, it is the first call in what is referred to in said notes as the 66th mile, south 80 poles up said creek, and the remaining calls covering the next five miles do not use any such expression as "up the creek."

Rec., p. 630.

Finally, though reluctantly given, Gannett's testimony, demonstrated, we respectfully submit, that the map and Commissioners' report of 1821 could not have been intended to follow or be predicated upon the so-called Davenport notes southwest of the Tennessee River along the Slick Rock contention.

This appears from the further cross-examination of Gannett after he had been driven to the extremity of denying that he had stated that the line ran "up said creek five miles" (Rec., p. 705), as follows:

> "Q. All right; do you mean to say now looking down here in this first mile, the first mile of this sketch number four, south of the river—how many times does that line there cross the creek as put down here in this sketch number four?
>
> "A. The line practically follows up the creek.

"Q. Well, don't it cross the creek twice accordin to this sketch?

"A. The creek as stated on this exhibit—the cree is sketched in.

"Q. Answer my question: don't that first mi sketched in there south of the creek show that crosses the creek twice?

"A. Yes, you might accept that.

"Q. Now then—now the second mile, the end the second mile south of the creek, according to th sketch number four made by Burns, he has got t **second mile**, or the 67th mile on the **east** bank that creek, hasn't he?

"A. As I say, the line practically follows the cree

"Q. But he has given that second mile south of t river being the 67th mile, according to your clai as being on the east bank of the creek, hasn't he?

"A. There is the west point—just on the east ban of the creek.

"Q. Don't that little bit of a circle on there indica the second mile south of the creek?

"A. Yes.

"Q. And that is on the east bank of the creek?

"A. Yes, just a fraction of an inch; a very sma fraction of an inch.

"Q. Now between the 66th mile circle and the 67 mile circle shown on this sketch number four, assu ing the one immediately south of the river to be t 65th, how many times in that second mile has he g that line crossing that creek?

"A. Why, as I say, the line practically follow right up the creek, that is the width of the line, po sibly is even a little wider than the creek as indicate here. You can't say that it crosses any number times. It practically follows the bed of the creek.

"Q. Yes. Now up here at this 68th mile there no doubt about the 68th mile circle, his having th on the east bank of the creek, is there?

"A. No that is the 68th right in the creek; this the 69th (indicating).

"Q. Here. All right.

"A. The 69th is east of the creek.

"Q. I am talking about this little sketch: whe has he the 68th mile circle?

"A. The 68th mile circle is right in the creek.

"Q. The 68th mile circle is right in the creek?

"A. Well, yes.

"Q. And where has he got the 69th mile circle?

"A. The 69th mile circle is just southeast of the creek.

"Q. On the east bank of the creek?

"A. Yes.

"Q. All right. Now he has got the 70th mile circle on the west bank of the creek?

"A. Yes.

"Q. A straight line from the 69th mile circle?

"A. Yes.

"Q. Crossing the creek?

"A. Yes.

"Q. Yes.

"A. Yes, that is right.

"Q. And there is not anything on that map of 1821 showing that the line between the **69th and 70th mile circles cross the creek**, is there?

"A. No.

"Q. And there is not anything on that map of 1821 that indicates that the 69th mile circle was on the east bank of the creek, is there?

"A. No.

"Q. The fact is that according to that map of 1821 the 69th mile circle is on top of a mountain, isn't it?

"A. It is on some kind of a ridge.

"Q. And some two miles or two miles and a half west of the stream shown on that map of 1821 marked creek, isn't it?

"A. Yes."

Rec., pp. 705, 706, 707.

Although he testified that the boundary line crossed the river approximately in the direction of Fodderstack, he admitted that the course or degree by which the North Carolina contention crossed the river was some thirty degrees off of the call of the Davenport notes—he considered that this difference was not too great to indicate an approximate resemblance, and that any degree "southwest" would conform to the general trend of the mountains.

Rec., p. 707.

He also admitted that running the last call in the 72d mile south 30 west 80 poles, as set out in the Davenport notes, would carry the line down on the west side toward Citico, and when the consequence thereof were pointed out to him he took refuge in insisting that there was a mistake in that call, though how he knew Mr. Davenport made a mistake in that entry it is difficult to tell.

Rec., p. 709.

The Davenport notes, as shown by an actual survey made in accordance therewith, show that they do not fit either the North Carolina or the Tennessee contention and could not have been adopted by the Commissioners.

After Messrs. Burns and Gannett had again argued the case of their employers from the Davenport notes, John L. Williams and W. D. Hale were furnished by defendant with a copy of said notes, and directed to go upon the ground and make a survey from said notes beginning at an undisputed point, the 59th-mile tree, and running southwestwardly, and also beginning at another undisputed point, the so-called 101st-mile stone, at the Unaka turnpike, and run back northeastwardly and ascertain and report the facts.

Rec., pp. 1545, 1616.

And if anything were needed to demonstrate the utter untrustworthiness of the testimony of Burns and Gannett that said Davenport notes and the plat made therefrom bear close resemblance to and practically tally with the North Carolina contention and the Burns map, Complainant's Exhibit "D," showing said contention, it is to be found in the result of the survey made by Williams and Hale.

Under the instructions given them Williams and Hale went upon the ground and began this survey at the 59th-mile tree and ran the courses and distances called for in the Davenport notes to the 72d-mile tree. When they reached

that point they were required to attend the United States Circuit Court at Knoxville, Tennessee, under a subpœna which had been served upon them, and they were unable at that time to complete their survey westwardly. They attended court, and after being released as witnesses they returned to the disputed territory to resume their survey, and began at the 101st-mile stone, at the Unaka turnpike, and ran northeastwardly about 15 miles, when, understanding that their presence was required to testify in this case was a week before they were actually examined, they quit work and came to Knoxville to be examined.

A blue-print copy of the Burns map, Complainant's Exhibit "D," was furnished Williams and Hale, and thereon they laid down the result of their work and platted the remainder of the Davenport notes thereon which had not been actually surveyed on the ground by them. This map is filed as Exhibit "AA" to the deposition of John L. Williams, and a copy thereof is found in the printed record facing page 1556.

On said Exhibit "AA" the red line beginning at the 59th-mile tree and running southwestwardly to the 72d-mile circle or tree was laid down from an actual survey. The remainder of said line from said 72d-mile tree or circle southwestwardly represents the Davenport notes from that point platted on Complainant's Exhibit "D" according to the scale thereof, and the last call, ending at the 101st circle, is 2½ miles southwest from the stone representing the 101st-mile tree or circle, at the Unaka turnpike, as shown on the Burns map.

Rec., p. 1554.

The solid line in green on said Exhibit "AA," beginning at the 101st circle, on the Unaka turnpike, and running northeastwardly was laid down in accordance with the actual survey of the Davenport notes for a distance of about 15 miles, and from that point northeastwardly the notes were platted on Complainant's Exhibit "D" and ended at

the 59th-mile circle in green, about 2½ miles northeast of the well-recognized 59th-mile tree, as shown on the Burns map.

Rec., p. 1554.

In the copy of the Davenport notes furnished Williams and Hale there was an error of 60 poles in the call leading to the 61st mile, the call given in the notes being south 20 west **160 poles**, while the copy furnished Williams called for only 100 poles.

Rec., p. 1549.

If this additional 60 poles had been run by Williams and incorporated into his survey from the 59th-mile tree, the result at the 72d-mile circle would have been to extend that part 60 poles farther down beyond Citico Creek, with corresponding pushing forward and away from the North Carolina contention on the remainder of the platted line.

Rec., p. 1554.

It is to be noted that the survey from the 59th-mile tree shown by the red line **crosses** four times the survey northeastwardly from the Unaka turnpike, shown by the green line.

The actual survey of the Davenport notes from the Unaka turnpike northeastwardly a distance of 15 miles carried across the Tellico River to the east side thereof, and about three-quarters of a mile below the so-called holly 86-mile tree, contended for by North Carolina.

Rec., p. 1546.

Hale and Williams surveyed the Davenport notes called for between the 86th and 87th miles (Rec., p. 632), beginning at the holly tree claimed to be marked as the 86th mile, and the first call of said notes "south 20 west 80 poles" came out in the head of a broad cove on the side of a mountain, not on Jenks Ridge, as claimed by North Carolina, but

to the west thereof, and the second call in that mile of "south 65 west 240 poles," making due allowance for variation, ended near the Big Oak Branch, a stream running into the Tellico River 100 poles (nearly a third of a mile) from the top of a mountain and southwestwardly from Jenks Knob (Rec., pp. 1552, 1553); and running a perpendicular line from the end of the second call to the top of the mountain 100 poles would be to a point on top of the main ridge 16 poles west of Jenks Knob, as measured on the top of the mountain. So that even in that mile discrepancies in distance occur which cannot be possibly accounted for.

By the actual running of said notes from the 59th-mile tree the 72d-mile tree or circle, which North Carolina claims should be on the top of the Fodderstack Ridge, is about a mile and three-quarters southwest thereof, across Citico Creek.

Rec., p. 1545.

And here we call to the attention of your honors that this actual survey of the Davenport notes to the 72d-mile tree or circle, as indicated on Exhibit "AA," would not only pass beyond the top of Fodderstack Ridge, but go in approximately the same direction as Pine Mountain, on which, as we have hereinbefore shown, many years ago W. D. Hale found a tree bearing State-line marks.

By taking the calls of the notes of the survey made by Gannett from the 59th-mile tree to the turnpike road, and by Burns from the turnpike road on the northeast side of the Tennessee River to the hemlock marked as a fore-and-aft tree on the north bank of said river, the distance from said 59th-mile tree to the river along the undisputed boundary line is shown to be 27,220 feet—that is, 1,820 feet over five miles (Rec., pp. 1555, 1612), and by this survey and these distances Williams located the end of the 64th mile on said map, Exhibit "AA," 1,820 feet from the river, according to the scale of said map as made by Burns.

The call in the Davenport notes from the 64th mile is south 75 west 320 poles, and this course and distance Williams indicated in a solid red line from the circle marked "64 M." which shows a line crossing Slick Rock Creek 970 feet above its mouth and ending 1,600 feet, or nearly a third of a mile, west of the mouth of Slick Rock Creek.

Rec., pp. 1555, 1556.

By the actual survey of the Davenport notes as made by Williams and Hale, the end of the 65th mile, instead of being at the mouth of Slick Rock Creek, ends 2,244 feet from the mouth of said creek, and if the omitted 60 poles had been actually surveyed this line would have been approximately 900 feet still farther west of the mouth of Slick Rock Creek.

Rec., p. 1556.

The difference between the Davenport notes either by survey or platting and the North Carolina contention is also shown by the map filed as Exhibit BB to Williams' deposition, bearing the legend "Plat of State line claimed by North Carolina, a line surveyed and platted from each end by Davenport notes. Scale one inch two thousand feet," which is found in the printed record facing page 1558. This map was made by Williams from notes of Burns and Gannett's survey from the 59th-mile tree to the point shown as Big Fodderstack. From Big Fodderstack around to about the point marked 78, figures cut in rock by McLelland, it was platted by notes of Hale's survey, and from that point to Jenks Knob and to the southwest thereof to about Beaver Dam Bald, it was platted from Williams' notes, and the remainder by his own and Hale's notes.

Rec., p. 1558.

The heavy black line with little circles on it from the 59th mile to 101 represents the contention of North Carolina.

Rec., p. 1558.

The solid red line running southwestwardly from the 59th-mile tree is the line actually surveyed on the ground to a point west of Citico Creek. The dotted red line was platted from the Davenport field-notes. The solid red line running from the Unaka turnpike to the Tellico River represents the actual survey of the Davenport notes by Hale and Williams, and thence northeastwardly the dotted red line represents the platting of said notes.

Rec., p. 1559.

The numerous notations in black letters, such as 95-6, "cut in rock by McLelland," etc., show the location of McLelland mile stones erected along the line surveyed by him from the Unaka turnpike northeastwardly.

Rec., p. 1559.

Where the red line shows the crossing of the stream it is correctly platted in from measurements.

Rec., p. 1560.

The headwaters of Tellico are taken from Burns' map.

Rec., p. 1561.

Additional Differences Between the Map of 1821 and the Davenport Field-notes.

As hereinbefore indicated, Tennessee secured from Burns a copy of the map which he filed at Asheville as Exhibit BB to his deposition, bearing the legend "Second comparative exhibit of the State line between North Carolina and Tennessee from the 59th-mile tree to the 101st-mile tree," on which four sketches or tracings, numbers 1, 2, 3, and 4, were laid down. This copy of Burns' Exhibit BB was certified by him as being a true tracing of said exhibit, and it was filed as Exhibit CC to the deposition of John L. Williams, and is found in the record facing page 1560.

It will be remembered that Burns in his direct examination (Rec., pp. 646, 655), and referred to on page 1562, had stated that the Davenport field-notes and the plat made therefrom and laid down on his Exhibit BB—Williams' Exhibit CC—tallied almost exactly with the map of 1821, and that he had found only three differences between the two, which he enumerated as being between the 11th and 12th miles, between the 71st and 72d miles, and between the 95th and 96th miles.

John L. Williams was asked to make an examination into these matters, and state whether he found any other discrepancies between said map of 1821 and said field-notes, and the plat thereof laid down by Burns on his comparative Exhibit BB, and he pointed out 39 different discrepancies shown in his testimony as follows:

> "A. Yes, I made a comparison of the copy of the field-notes which I had with the 1821 map, and I found a great many differences.
>
> "Beginning at the northeasterly end of the line I found:
>
> "First. Between the 5th and 6th mile circles the 1821 map shows three courses and the Davenport notes show 4 courses;
>
> "Second. Between the 9th and 10th mile circle the map shows 2 courses, and the field-notes call for 3;
>
> "Third. At the 11th mile circle, the 1821 map shows a slight turn in the line; the Davenport notes call for a turn of 65 degrees in the line;
>
> "Fourth. At the 12th mile circle, the map shows a turn in the line; the Davenport notes call for the same course continued.
>
> "Fifth. Between the 19th and 20th miles, the map shows a course running southwest; and the Davenport notes show the line running north 70 west;
>
> "Sixth. At the 22nd mile circle, the map shows the line about south 30 west; and the Davenport notes show south 25 east;
>
> "Seventh. Between the 23rd and 24th mile circles, the map shows 3 courses; the notes call for 4 courses;

"Eighth. Between the 24th and 25th mile circles, the map shows 3 courses; the notes call for 4 courses. It calls for the 25th mile twice and has 60 poles surplus distance.

"D. 174. That is you mean it has in it 380 poles, instead of 320?

"A. Yes.

"Ninth. 34th mile circle, the map shows the line turns to the left; the Davenport notes show a turn to the right;

"Tenth. At the 39th mile circle, the map shows a turn to the left; the Davenport notes show a turn to the right;

"Eleventh. At the 40th mile circle, the map shows the same course continued; notes show 10 degrees turn in the line;

"Twelfth. At the 41st mile circle, the map shows a turn in the line; notes call for the same course continued;

"Thirteenth. From the 41st to the 42nd mile circles, the mile circles moved up one course but shows no change in the direction according to the map; the notes show a 55-degree change where a mile circle belongs;

"Fourteenth. At the 42nd mile circle, the map shows slight turn in the line; to the right; the notes call for 70 degrees turn in the line;

"Fifteenth. At the 44th mile circle, the map shows straight line continued; notes show a 10-degrees turn to the left;

"Sixteenth. Between the 45th and 46th mile circles, same straight line for a mile shown on the map; an angle of 25 degrees between lines shown in Davenport notes, also a long line—shown on the map is south 58 west, the notes call for south 80 west;

"Seventeenth. At the 46th mile circle the map shows an angle of about 75 degrees; the notes call for an angle of 45 degrees;

"Eighteenth. The map shows a path at 53rd mile circle; notes call for a path at 54th mile circle;

"Nineteenth. From the 59th to the 60th mile circles the map shows second course turns to the

right; notes show the second course turns 20 degrees to the left;

"Twentieth. At the 60th mile circle, map shows a turn of the line of about 45 degrees to the left; notes call for a turn of 5 degrees to the left;

"Twenty-first. From the 60th to the 61st mile circles the map shows 4 courses; the notes call for 3 courses;

"Twenty-two. From the 61st to the 62nd mile circles map shows the two first courses in practically a straight line; notes call for a turn in line of 20 degrees;

"Twenty-three. From the 66th to the 67th mile circles, the map shows 5 courses; and the notes call for 4 courses;

"Twenty-four. The map shows no path; Davenport notes call for Cheoee Path;

"Twenty-five. At the 69th mile circle, map shows no stream; notes call for an east bank of creek;

"Twenty-six. At the 70th mile circle there is no stream; notes call for the west bank of creek.

"D. 175. I will ask you to state on what kind of land the map shows the 69th and 70th mile circles to be?

"A. Shows them to be on a mountain.

"D. 176. And not on a stream?

"A. Yes sir.

"D. 177. Now proceed with 27th?

"Twenty-seven. Between the 70th and 71st mile circles the map shows 3 courses; notes call for 4 courses, with a total distance of 360 poles;

"Twenty-eight. Between the 71st and 72nd mile circles, the map shows the last course running south east; notes call for the last course running south 30 degrees west.

"D. 178. Let me ask you right there what is the first call in the 71st mile, according to the notes?

"A. South 30, East 200 poles.

"D. 179. Then if the last call in the 72nd mile had been south, 30 east, the first call in the 73rd mile would have been a straight line in extension of that wouldn't it?

"A. Yes, that is if the last call in the 72nd mile

had been south 30 east, instead of south 30 west, then it should have been in a straight line.

"D. 180. Does the map itself show a straight line between the latter part of the 72nd mile and the first part of the 73rd mile?

"A. No, it is a turn in the line at the 72nd mile circle.

"D. 181. All right—then 29.

"A. Twenty-nine. The map shows one straight line between the 74th and 75th mile circles; the Davenport notes show two lines with a turn of about 15 degrees to the right in the line, that is an angle of about 15 degrees in the two lines the mile of line shows a dot between the two circles.

"D. 182. Which indicates what?

"A. It indicates two courses.

"Thirty. At the 76th mile circle, map shows a change in the course; notes call for the same course continued;

"Thirty-one. Between the 77th and 78th mile circles, the last course is shown about due south on the map; notes call for the last course south 45 degrees east.

"D. 183. There is a discrepancy of 45 degrees?

"A. About 45 degrees, yes.

"Thirty-two. At the 85th mile circle, map shows a change in course; notes call for the same course continued;

"Thirty-three. At the 89th mile there is no stream shown for Beaver Dam; the notes call for head of Beaver Dam Creek.

"Thirty-four. 90th to the 91st mile circles, map shows one straight line; the notes show a change in bearing of 20 degrees between courses;

"Thirty-five. Between the 91st and 92nd mile circles, map shows last course about north 45 west; notes call for last course south 45 west.

"Thirty-six. At the 94th mile circle, map shows straight line continued; notes show a change of 15 degrees.

"Thirty-seven. Between the 95th and 96th mile circles, map shows the 3rd course about north 45 west; notes call for the 3rd course south 45 west.

"D. 184. What discrepancy is that in degrees?

"A. That would be a right angle.
"D. 185. About 90 degrees?
"A. Yes.
"Thirty-eight. Between the 96th and 97th mile circles, map shows one straight line; notes call for two courses differing in bearing about 20 degrees;
"Thirty-nine. 103, 104 & 105 mile circles, map shows straight line continued; notes call with bed of the river; also at the 103rd mile circle no stream shown and notes call for crossing a branch."

Rec., pp. 1562, 1563, 1564, 1565.

Williams was also asked to examine said comparative map Burns Exhibit BB and Williams Exhibit CC, whereon purported to be traced the map of 1821, and to point out whether there were any discrepancies between Burns' tracings on the map of 1821 and the map itself, and he showed the following errors and alterations in the tracing of said map of 1821 as laid down on said Exhibit BB:

"Between the 60th and 61st mile circles it shows courses, while the original map shows 4 courses.
"Between the 65th and 66th mile circles it shows courses, or else he shows the mile circles moved up one course. The 1821 map shows 4 courses.
"Between the 66th and 67th mile circles he shows courses or mile circles moved up one course; the 1821 map shows 5 courses; the 1821 map shows 5 courses or else shows the mile circle one course back.
"Between the 76th and 77th mile circles he shows 2 courses, while the 1821 map shows 3 courses.
"Between the 77th and 78th mile circles he shows 3 courses, the 1821 map shows 4 courses.
"Between the 81st and 82nd mile circles he shows 2 courses, the 1821 map shows 3 courses.
"Between the 92 and 93rd mile circles, he shows courses, the 1821 map shows 6 courses, and there is also a difference in the miles of the degrees of the line between 96th and 97th mile circles.
"He shows one course, the 1821 map shows courses."

Rec., pp. 1565, 1566.

That these "differences" and alterations were made by Burns with the distinct purpose of making his tracing conform to the Davenport field-notes is manifest.

As shown by the following testimony of Williams:

"D. 189. Now I will ask you to state whether or not you have examined and compared these tracings by Burns of the map of 1821 on your Exhibit 'CC' with his tracing of the Davenport field-notes as shown on that map?

"A. I have.

"D. 190. I will ask you to state if in nearly every instance his change as shown in his tracings of the map of 1821 isn't to make it conform to his tracings showing a plot of the Davenport field-notes?

"A. Most of them appear to be, yes.

"D. 191. Now I want to ask you to examine the courses of the 66th mile as laid down on the original map of 1821, which is here before you, and I ask you to state what is the course of the last line in that mile as shown on this map of 1821?

"A. It appears to be about due south.

"D. 192. Now I will ask you to examine his plotting of the map or alleged tracing of the map of 1821 as shown on your Exhibit 'CC' and state what is the course of the last call in that 66th mile as he has shown it on that tracing?

"A. It appears to be about west.

"D. 193. Due west, isn't it?

"A. Looks to be about west.

"D. 194. Now I will ask you to refer to the alleged Davenport field-notes in the original book here, and state what is the course of the last call in the 66th mile?

"A. Due west 60 poles.

"D. 195. So that at this point Burns' tracing of the 1821 map as shown on Exhibit 'CC' discloses a change from the course as shown on the map itself from due south to due west to make it conform to the call in the Davenport notes?

"A. It appears that way on the tracing.

"D. 196. Whatever the purpose may have been?

"A. Yes.

"D. 197. Now then I will ask you to state whether in plotting or tracing this map of 1821, as shown on Exhibit 'CC' he made any alteration in the courses as shown on the map between the 71st and 72nd mile

"A. I didn't detect any changes in the tracing, both copies are the same.

"D. 198. Now in laying the Davenport field-notes as shown on this Exhibit 'CC,' did he make any alteration in those field-notes between the 71st and 72nd mile?

"A. Yes he did. The course called for south 30 west. He seems to have changed it to south 30 east and makes it in the same straight line with the next course south 30 east.

"D. 199. Does the map itself show a straight line between those two points?

"A. It does.

"D. 200. I mean between the end of the last call in the 72nd mile and the first call in the 73rd mile?

"A. The map of 1821 does not show a straight line, but shows a turn in the line at the 72nd-mile circle.

"D. 201. Now let me call your attention to the plotting of the Davenport field-notes as shown on this Exhibit 'CC' between the 67th and 68th miles, and I will ask you if he has made any alteration from the notes in laying them down on his plot?

"A. The tracing conforms to the notes in having the same number of courses that the notes call for, when the map of 1821 is different from the calls.

"D. 202. Well now examine his plotting of the Davenport notes on this Exhibit 'CC,' and tell me whether or not the line which is called for between the 67th and 68th mile circle in the Davenport field-notes is not due west 140 poles and if he hasn't plotted it north 83 west?

"A. I didn't make any measurements of the angles on his plat at all.

"D. 203. Do you know of any reason why the course between the 95th and 96th miles called for in the notes "south 45 west 80 poles,' should be

arbitrarily changed to north 45 west as plotted by Mr. Burns?

"A. No, unless it is because the map appears to show that."

Rec., pp. 1566, 1567.

Before leaving this comparative map, Exhibit BB, cooked and manufactured in certain material particulars, we desire to call to the attention of the court that considering the position of the 66th-mile circle on the map of 1821, which is apparently just west of the stream marked "Creek" and the line to which, according to the compass marks on said map, appears to be due south, if the last call in the 66th mile of the Davenport notes, being a due west line for 60 poles, had any relevancy at all to that mile circle, the beginning of that line would be eight or nine hundred feet **east** of that stream marked "Creek" (Rec., p. 618), when if that map shows anything in relation to that stream marked "Creek", it shows that the boundary line is to the west thereof, and that no part of it is east of the creek.

And here we call to the attention of Your Honors that although Burns was again placed on the stand after Williams had demonstrated the utter untrustworthiness of his testimony and comparative Exhibit BB, nevertheless it was not even sought to have him explain or give any reason for the material alterations—to put it mildly—made by him in manufacturing his Exhibit BB.

Is it to be wondered that complainant did not print Burns' Exhibit BB for the inspection of this court?

In the cross-examination of Williams these "discrepancies" were endeavored to be minimized, as of little importance, but on re-examination Williams reiterated that he considered "them material and misleading."

Rec., p. 1610.

On cross-examination Williams had been asked a number of questions in relation to trees at the end of the calls of the Davenport notes run by him, and on re-examination he

stated that he found no marked trees at the end of the miles, and that he was convinced after having been over the mountain a number of times, and after making careful examinations for such trees, that it was only on rare occasions that a mile tree was marked, and in his opinion between the scarlet oak bearing the "59 M" on it and the marked fore-and-aft hemlock tree on the north bank of the river, he found only two trees which he was satisfied had the original marks on them. He further stated that there was a marked difference both in bark and leaves between a scarlet oak and a red oak.

Rec., p. 1617.

During his cross-examination a complaint also seemed to be made that Williams, in his survey of the Davenport notes, ignored marked trees at the end of the lines, but he stated that he found no such trees, and, moreover, at the end of the calls run by him, finding himself considerably off of the top of the mountain, he would make an offset to the top of the mountain in order to test whether the running of the course [illegible] the next mile would fit the top of the mountain, but they would not, and finding no trees or natural objects at the end of the calls to control him he was bound to follow the course and distance set out in the Davenport notes. This also applied to a line beginning at the mouth of Slick Rock and running thence according to the calls of the Davenport notes. Neither of these tests showed a line conforming to the North Carolina contention.

Rec., p. 1617.

Williams gives it as his opinion that after a careful examination of the Davenport field-notes as applied to conditions on the ground, **that neither the map of 1821 nor the report of the Commissioners was made from said field-notes.** He says:

"There is such a wide difference between the report of the Commissioners and the calls in these field-notes that I cannot think that the report of the Commissioners was made from such field-notes."

Rec., p. 1568.

Again:

"I don't think any one having surveyed a line with such notes as are contained in that book would sign a map showing an entirely different thing at different places. I know very well I wouldn't do it."

Rec., p. 1615.

W. D. Hale had been over this entire territory with Williams, and aided him in making the maps Exhibits AA and BB to Williams' Deposition, and Hale corroborates Williams' testimony in its material aspects, and his final conclusions are stated as follows:

"Q. 89. Now I will ask you, Mr. Hale, whether in your opinion after an examination of these Davenport notes and the survey of them to the extent you have described and your reconsideration of the ground and conditions generally surrounding the disputed territory the map of 1821 was made from the Davenport field-notes?

"A. No, I don't think it could have been from the Davenport field-notes. I couldn't have made the map from those field-notes.

"Q. 90. You say you couldn't have made that map from the Davenport field-notes?

"A. No, I couldn't have made that map from the Davenport field-notes and conform to the notes.

"Q. 91. I will ask you to state whether the examination of those notes or subsequent work done in surveying those notes as you have described and your further consideration and examination of the ground out there has caused you to alter your opinion in any way as to the location of the boundary line between the States as you have heretofore testified?

"A. No, taking the map of 1821, the Davenport field-notes and the report of the commissioners in

connection, I don't see how any one could go up Slick Rock Creek and up the Fodder Stack lead for the State Line.

"Q. 92. What about going down State Ridge and crossing Tellico River at the Holly?

"A. They might have run up Slick Rock Creek and down State Ridge, but their report clearly shows to my mind that they were tentative lines, that they didn't adopt that as the line between the States.

"Q. 93. What, in your opinion, did they find according to that report?

"General BICKETT: State of North Carolina objects to that—let him tell what he found.

"D. 94. Where, in your opinion, does that report and your examination of the ground and all things taken into consideration with your knowledge of this case, show the line to be between the States, and your experience as a surveyor?

"A. I believe it to be on the ridge east of Slick Rock Creek, running up to the Hangover, and thence back to the point marked Junction, called Junction, where the two contentions come together, then following the undisputed State Line to the point called County Corner, then leaving the North Carolina contention and following the divide of waters, or water shed, around the head of Tellico River and back to Jenks Knob to the undisputed State Line.

"D. 95. Now your reasons, if you want to give it?

"A. First, the approach to the Tennessee River at a point opposite to the end of a ridge it is a broad face at that point. Of course there are ovals in it called spurs, and looking at it from a point north of the river we are supposed to strike the main ridge at the nearest and most accessible point from the river. There can be no doubt in the mind of any one who has been there and seen it that the ridge on which is Stratton Bald, the Hao and the Hangover is the main ridge, and the easiest and most accessible route to that is immediately across the river from the point at which the commissioners strike the river and mark the State line; then at the Laurel Top and going down toward the Tellico River looking southwestward the highest peak is Grassy Knob, and any one would be very easily lost at that point.

Going down from Laurel Top toward Grassy Knob, the water shed is off to the left and lower down and it could be very easily overlooked but after passing Grassy Knob for a half mile to three quarters of a mile it is very easy to be seen that the waters from the ridge to the left or southwestward flow to the east and northwestward or to the east and north and I believe that the commissioners run down that ridge to and crossed Tellico River, but their report shows that they abandoned the line and adopted a line around the head waters of Tellico River and the map of 1821 sustains that report in showing a continuous ridge at that place, and all the waters of Tellico River in Tennessee."

Rec., pp. 1634-1635.

C. S. Slagle:

This witness was given the Davenport notes, and with Barns, sent onto the territory covering the Slick Rock contention, but made **no actual survey, or attempt to fit the notes to the ground by a survey thereon**. However, when he testified he said, in substance, on direct examination that the notes substantially fitted the North Carolina contention.

Rec., p. 761.

But when the striking and vital differences between the notes and the report and map of 1821 were pointed out to Mr. Slagle on cross-examination, and while it was difficult to secure an answer from him on this question (Rec., pp. 772-773), he finally said: "**This map don't conform with the contention of North Carolina or Tennessee either, at all.**"

Rec., p. 773.

Further, he said:

"Q. Mr. Slagle, if you had been drawing a map from these calls (Davenport notes) would you have put the 69th mile circle on two miles and a half or three miles west of the creek when the notes bear you south on the east bank of the creek?

"A. I certainly would not.

"Q. **Then they don't conform, the map and these field-notes.**

"A. **Not with regard to the creek they don't.**

"Q. Well, all you mean to say is the general direction is southwest?

"A. Yes.

"Q. But they don't conform to the creek at all?

"A. No sir."

Rec., p. 774.

So that in this vital and essential particular the last expert witness offered by North Carolina gives it as his final opinion that the map of 1821 does not conform to the Davenport field-notes in the matter of Slick Rock Creek.

No field-notes of the survey of 1821 were filed with either State.

There is no proof that any such field-notes were filed with the report and map of 1821.

Neither the map nor said report refers to the field-notes of either Davenport or Armstrong in any way.

We have hereinbefore shown that when Governor McMinn of Tennessee brought the action of the Commissioners to the attention of the Tennessee General Assembly he referred only to the report and made no mention of field-notes accompanying said report or any other way.

The Journals of the North Carolina House of Representatives of 1821 (p. 10) recite that on November 20, 1820, Governor Franklin of North Carolina sent a message to the General Assembly transmitting the report of the joint commissioners of both States and a plat of the line, but he made no mention of or reference to any field-notes.

It is not improbable that it was customary to report and file the field-notes of a boundary survey, and this the Commissioners, appointed under the authority of the North Car-

olina Act of 1796 (Appendix, p. 9) did, when they made their report in 1799.

Rec., pp. 1095-1121.

Aside from the allegation made in the bill to the effect that the Commissioners of 1821 filed their field-notes, which is put in issue by the answer, the record does not disclose even a claim that the field-notes were filed, or that any field-notes of the survey were ever **agreed upon,** or intended to be reported.

Further, it is shown that north of the Cataloochee turnpike covering that part of the boundary line run by the North Carolina Commissioners in 1799, grants from the State of Tennessee for land on the boundary line called for the courses and distances of said line.

Grant to Peck, Rec., pp. 1588, 1531.

While south of the Cataloochee turnpike, and between said turnpike and the Tennessee River, the grants sometimes call for a mile tree on the boundary line, but do not call for or set out the courses and distances on the boundary line.

Grant to Peck, Rec., 1519, 1532.

Further—

No mile-marked trees are found south of the Tennessee River, and none are called for in grants from either State.

It is not even claimed that the proof in this record refers to or shows a single mile-marked tree south of the Tennessee River—aside from the **disputed** so-called Holly 86-mile tree, which, as we have shown, is neither in the right location nor at the proper distance for the true 86-mile tree.

It is admitted that grants from both States north of the Tennessee River call for mile trees at different places along the boundary between the Cataloochee Turnpike and the

Tennessee River, but of all the grants offered in evidence either by North Carolina or Tennessee there is not one grant for lands south of the Tennessee River which refers to or calls for a mile tree on the State line—and neither Gannett nor Burns nor Fain, nor any other witness offered by complainant, pretends to have found a single mile-marked tree—other than the said holly tree near the Tellico River.

Reasons Suggested for Not Filing Field-notes.

That there were two surveyors with the Commissioners—Davenport for North Carolina and Armstrong for Tennessee—is admitted.

The copy of the so-called Davenport notes bears on its face evidence of positive error in some places—and uncertainty in other places.

Rec., pp. 626-627.

Moreover, it further appears upon the face of the alleged copy of said notes that they were being compared, or were compared, down to the 52nd-mile tree—the notation to that effect being in the handwriting of William Davenport.

It is hardly probable that the comparison was made with his own notes because of the material alteration in the notes covering the 26th, 27th, 28th and 29th miles, shown to have been crossed out on pages 626 and 627 and an entirely different set of notes substituted therefor.

Rec., p. 627.

With whose notes was the comparison being made?

It is not unreasonable to infer that the comparison to the 52nd-mile tree might have been made with a copy of Armstrong's notes—however, while that is a mere surmise, nevertheless certain it is that there is no statement or notation upon said notes to the effect that they were compared and **corrected after the 52d mile,** and it is to be noted that the

present dispute is along the boundary line several miles southward from said 52nd-mile tree.

That someone ran and marked a line along Hangover Lead and Ridge, is established by the evidence.

If Davenport, as he probably did, ran a tentative line up Slick Rock Creek, then is it not reasonable to infer that the line along Hangover must have been run and marked by Armstrong?

Here were two surveys—one along the Hangover Lead or Ridge to the main mountain, which conformed to the calls of the Cession Act—the other for five miles along the gorge of Slick Rock Creek, which was a departure from the description fixed in the Cession Act.

The Commissioners, by the acts under the authority of which they were making the survey, were directed (Appendix, pp. 10-13) to run the line agreeably to the calls of the Cession Act, so the Commissioners had a line along the Hangover run probably by Armstrong, and a line along Slick Rock probably run by Davenport, and further they had been misled into following the so-called State ridge away from the main ridge of the mountain down to the Tellico River, and is it not reasonable to conclude that when the Commissioners came to **adopt** a line they determined to disregard "field-notes" or "courses and distances," and adopted a line in conformity with their instructions—that is, "agreeably to the calls of the" Cession Act. In their report they stated that they did follow the calls "**designated**" in said act and in the Constitution of Tennessee.

In thus determining to adopt and in adopting the line as fixed by the Cession Act on the main ridge of the mountain, they avoided deciding any differences that may have arisen between the two surveyors, so that it would not appear that the work of either had been preferred, and that of the other condemned or rejected.

Deaver's Map Made under the Authority of North Carolina in 1837.

Said map, Exhibit FF to the Deposition of John L. Williams (Rec., p. 1576), shows on its face that the line between the States reaches the Tennessee River from the South on a ridge and immediately opposite a similar ridge approaching the river from the northeast.

This fact so unmistakably shown by said map, sustains Tennessee's contention, notwithstanding the apparent distance from the boundary line the Cheoee River appears to have been "sketched" on said map.

Further, said map shows the boundary line between the States to be not only on a ridge, but on the water shed, and the general course of and slight turns in the boundary line southwest of the Tennessee River, as shown on said Deaver map, correspond with the Tennessee contention along the Hangover Ridge.

Williams, Rec., pp. 1576, 1577-1581, 1614.

Hale, Rec., pp. 1635-1637.

TENNESSEE'S CONTENTION SUSTAINED BY ANCIENT MAPS.

That ancient maps made long ante litem motam may be looked to as evidence on questions involving the location of a boundary is well settled, and if the determination of the questions involved in this case should be submitted to the mute but impartial evidence of the old maps beginning with the first shown to be in existence, made in 1818, and running down to the institution of litigation between private claimants over the lands involved in this case, the result in favor of Tennessee's contention would be assured.

Complainant, recognizing the weight and value of impartial map evidence, in submitting her evidence-in-chief examined Mr. S. S. Gannett in relation to the maps bearing on this controversy, which have been deposited in the Congressional Library, and we have hereinbefore pointed out the misrepresentations by Gannett of the contents of said maps in his endeavor to sustain North Carolina's contention.

Defendant took the deposition of Mr. O. Welti, the first assistant of the Map Division of the Library of Congress, and brought into this record the contents thereof, so far as it was possible by oral testimony. We apprehend that in a question of this magnitude this honorable court has the power, if it desires, to call for the production of the maps themselves.

We will now briefly refer to said maps.

The oldest map found in the Library is one made by Cary in 1818, and this map shows the line between the States southwestwardly from the Tennessee River as being on a mountain, and that all the waters of Tellico River are on the Tennessee side of said boundary line.

Rec., pp. 919-920.

This Cary map was prior to the running of the boundary line by the Commissioners in 1821.

The next in point of time is a map made by Cary and Lee, in 1822, which shows the line southwestwardly from the Tennessee River to be on a mountain ridge and not following any stream, and that all the waters of Tellico River are in Tennessee.

Rec., p. 920.

It is to be noted that this map by Cary and Lee was made the year immediately following the report of the Commissioners, and it is confirmed by the acts of both States.

To avoid repetition, we now set out in chronological order thirty-three other maps in the Congressional Library showing the boundary line to be as contended by Tennessee—that is, on a mountain beginning on the south bank of the Tennessee River, and running southwestwardly around and to the east of the headwaters of Tellico River to the point where the line turns south toward the Georgia line, to-wit:

Lucas, 1823; Tanner, 1823, 1825, 1830; Hinton, 1831; Mitchell, 1832; Tanner, 1833; Tanner, 1839; Hinton, 1842; Mitchell, 1843; Copperthwait, 1854; Cook, 1857; Colton, 1860, 1861; Loyd, 1862, 1863; Nicholson (U. S. Coast Survey), 1863; Nicholson and Foote (U. S. Coast Survey), 1864; Nicholson & Lindenkohl (U. S. Coast Survey), 1865; Merrill, 1865; Schonberg, 1866; Colton, 1866, 1867; Pearce, 1871, 1872; Williams, 1875; Gray, 1874, 1881; Cobb, 1881; Kerr, 1882, 1883; Hord, 1888; Colton, 1890.

Welti, Rec., pp. 918-921, 927.

Mr. Welti further testified that the **only** maps in the Congressional Library which did not show an unbroken boundary line on a ridge or mountain from the Tennessee River southwestwardly to the Hiwassee River were the Burr map of 1839, Myer map of 1845, the Tanner map of 1845, and the Johnson map of 1865, and that the **only** map which showed that the State line followed a creek was one by Brazier made in 1833.

We desire to call to the attention of the court the Cook map, made in 1857, which bears the following title:

"Cook's new map of the State of North Carolina, constructed from actual surveys, private contributions, and authenticated public documents procured for the purpose, under a special resolution of the General Assembly of the State. William D. Cook."

Mr. Cook appears to have been the Principal of the North Carolina Institution for the Deaf and Dumb and Blind.

Rec., p. 923.

This Cook map, made under the authority of a special resolution of the North Carolina General Assembly, shows that the boundary line between the States southwestwardly from the Tennessee River follows a mountain ridge, and that it runs around and to the east of a stream which must be Tellico River flowing by a place called Tellico Plains, and thence into the little Tennessee River, as the Tellico River unquestionably does.

Rec., p. 924.

Further, Mr. Welti testified that the boundary line leaves the Tennessee River in a southwestwardly course, apparently on the summit of a mountain, and that immediately to the eastward of said boundary line appears a stream, marked "Cheoee," which flows into the Tennessee River just at the foot of the mountain and to the east of the State line.

Rec., p. 924.

Further, this North Carolina map, made by Cook in 1857, shows a creek called Beaver Dam Creek, which rises nearly at the line between the States of North Carolina and Tennessee on the North Carolina side, and runs down into an unnamed larger stream, which is evidently the Hiwassee River.

Rec., p. 926.

The head of Beaver Dam Creek, as shown by Exhibit BB to the deposition of Williams, facing page 1558 of the printed record, is just southeast of the main and dividing ridge, Tennessee's contention, and is to the east of the North Carolina contention. (See map BB, p. 1558; Williams, Rec., p. 1621.)

In addition to the maps testified to by Mr. Welti, it is proper to note that every topographical map made under the authority of the United States Government shows the boundary line between the States to be located on a mountain range east of the headwaters of Tellico River, thus throwing all the waters of said river into the State of Tennessee, and all maps made under the authority of the United States show the line leaving the river to the southeast to be on a ridge down to the time when Gannett and Yates—or, as Gannett says, Yates undertook in his office in Washington to locate the line along Slick Rock Creek.

Further, the map of 1837 made under the authority and by the direction of North Carolina shows, as we have already pointed out, an unbroken line on a mountain ridge from the Tennessee River to the point at the end of Unaka Mountain where the line turns southward towards Georgia.

It is not improper to here again call to the attention of the Court that a copy of this map was put in evidence by Tennessee and notice given to North Carolina to produce the original and the notes of the survey thereof, which the North Carolina statute required to be kept, and from which said map on its face shows that it was made.

We next call to the attention of the court map filed as Exhibit DD to the deposition of John L. Williams, and found in the printed record facing page 1568, which was made by Charles Waring in 1876, and purports to be "a map of east Tennessee and western North Carolina," showing mineral deposits in the vicinity of Knoxville, Tennessee. This map also shows an unbroken boundary line on a mountain ridge from the Tennessee River to the end of

Unaka Mountain where said line starts south toward the Georgia line, and it further shows flowing into the Tennessee River just east of the boundary line a stream called Cheoee Creek.

Neither the Contention of North Carolina nor of Tennessee Conforms in Respect of Distance to the Map of 1821.

Assuming that the circles along the boundary line as shown by the map of 1821 were intended to represent miles, and that therefore the distance from the 59th-mile circle to the point, supposed to represent the 101st-mile circle, where the boundary line turns south toward the Georgia line was intended to be represented on said map as 42 miles, the proof in this cause shows that neither the North Carolina nor the Tennessee contention, as actually surveyed on the ground, conforms to that exact distance between the points stated.

According to Burns' survey, the distance from the 59th-mile tree along the North Carolina contention to the so-called 86th-mile tree, just west of the Tennessee River, is 27.64 miles, and the distance from the so-called 86th-mile holly tree along the North Carolina contention to the 101st-mile tree or circle, at the Unaka turnpike, is 16.31 miles, making in all 43.95 miles from the 59th-mile tree to the 101st-mile tree—or practically **two miles in excess of the 42 miles supposed to be called for by said map.**

The discrepancy in distance along the Tennessee contention by way of Hangover and **around the main and dividing ridge on the mountain east of Tellico** is about four miles, as insisted by Burns.

Rec., p. 253.

Inasmuch as the Tennessee contention unquestionably follows the main and dividing ridge, this being in accord with the calls of the Cession Act, we submit that this differ-

ence or discrepancy in distance does not materially milit
against defendant, especially in view of the fact that
evidence shows (McNab, pp. 1522, 1523) that along
undisputed line between the Meigs line, which crosses
boundary between the States at 31-½ miles and the 5
mile tree there is a discrepancy of a little more than th
miles—that is, that the distance actually measured r
over the distance called for by the plat a little more th
three miles in eighteen and a half miles.

So we submit that Tennessee's contention, conforming
the imperishable locative calls of the Cession Act, is not
be defeated by such a mere discrepancy in distance.

It is singular what curious results may be shown
figures.

The discrepancy in distance above noted on the T
nessee contention arises in that portion of the line runni
around the headwaters of Tellico along the main divid
ridge, and if that phase of the controversy were elimina
the distance from the 59th-mile tree along the Tenne
contention **by way of the marked hemlock and Hango**
Ridge, and thence along the undisputed State line betw
Hangover and the State Ridge, and thence following
North Carolina contention, instead of around the he
waters of the Tellico, to the 101st-mile tree, at Unaka tu
pike, would measure within 700 feet of exactly 42 mile
to be explicit, the distance would be 41.87 miles, or o
.13 of a mile less than the 42 miles supposed to be ca
for by said map.

However, Tennessee stands on this record for both c
tentions, and she is not to be dragged away from the pl
calls of the Cession Act by a discrepancy in distance of
or four miles in a line 42 miles long, especially when
uncontroverted proof shows that where the boundary
is not in dispute the map in the matter of distance is
grossly inaccurate.

The Present North Carolina Contention is Invalid Because it Has Never Received the Sanction or Consent of Congress.

By her Cession Act of 1789 North Carolina ceded to the United States all of her territory west of a line along the extreme height and highest ridge of the Great Iron or Smoky Mountain to the place where it is called Unicoy or Unaka Mountain, and the territory so ceded was accepted by the United States and thereafter erected into the State of Tennessee—thus guaranteeing to defendant State of Tennessee that same line as her eastern boundary.

The evidence in this cause establishes as a fact—indeed, it is practically admitted by every witness for North Carolina save only D. B. Burns, that the present North Carolina contention, both at Slick Rock and Tellico, is a **material departure** from said Cession Act and the act of Congress accepting the ceded territory.

Our proposition is that even if the Commissioners in 1821 ran and intended to adopt the present North Carolina contention both at Slick Rock and Tellico, that such new line sought to be adopted by said Commissioners, away from and not in conformity with the description of the boundary as called for in the Cession Act, never having received the consent or sanction of the Congress of the United States, is invalid and in conflict with article 1, section 10, clause 3 of the Federal Constitution, providing that "No State shall, without the consent of Congress, * * * enter into any agreement or contract with another State," etc.

We are not unmindful of the holding of this court in Virginia *vs.* Tennessee, 148 U. S., 503, that the consent of Congress may be given after as well as before the compact, and may be inferred from other acts of Congress relating to judicial divisions and administrative or revenue districts, and that it is a principle of public law universally recognized, that independently of any effect due to the compact as such,

a boundary line between States, as between private persons, which has been not only run out and marked upon the earth, **but afterwards recognized and acquiesced in by the parties for a long course of years,** will be treated as conclusive, even though it varies somewhat from the call or description of the original grant. But we respectfully insist:

(1) That the Congress has never consented to the adoption of a new line departing from the calls of the Cession Act in any way whatsoever, and the facts in this case are materially different from those found in the case of Virginia *vs.* Tennessee, where Federal districts and revenue and administrative divisions, as enacted by the Congress, recognized the particular line which had been run, marked and recognized by both States.

(2) No such acquiescence by Tennessee in the present contention of North Carolina is shown in this case as was established in Virginia *vs.* Tennessee.

On the contrary, both parties have exercised acts of dominion within the disputed territory by the issuance of grants, by the levy of taxes, and, **on the part of Tennessee, by judicial sale of the land for taxes, and by the running of process from her courts into the disputed territory, and by permitting residents within the disputed territory to vote in her elections.**

The mandate of the Constitution is plain, and that the consent of Congress is necessary to give validity to any compact between States affecting their boundary, and particularly to one altering their boundary, as recognized by this court in—

Virginia *vs.* Tennessee, 148 U. S., 525.

It does not strengthen North Carolina's case that this departure from the true boundary, as defined in the Cession Act, was attempted to be confirmed by acts of the General Assembly of both States, because neither the line nor the

port in relation thereto, nor said confirmatory acts, have any way expressly or impliedly been recognized, conated to or sanctioned by the Congress of the United States. Moreover, the equity of the case is for North Carolina to p at the boundary fixed by her Cession Act.

Further, **there is nothing in either of the confirmatory ts to indicate that the line described in the Cession Act d been departed from** and a **new line established.**

In fact the Commissioners reported that they ran and so ported the line "**as designated**" in the Cession Act (Rec., 51) and the North Carolina confirmatory act of 1821 lopting that report recited that the boundary line had en run **agreeably to the calls of said Cession Act** and in nformity to the instructions given said Commissioners.

Appendix, pp. 11-12.

Conclusion.

The record in this case may be summed up as follows:

1. The Cession Act of 1789 fixes the boundary line at and long the extreme height of the main mountain between the oints in controversy.

Appendix, pp. 5, 6.

2. The Commissioners appointed in 1821 were directed y the acts of both States to run the line "agreeably to the rue intent and meaning" of said Cession Act.

Appendix, pp. 10, 13.

3. The Commissioners of both States reported that they had run "the said dividing line as designated" in said Cession Act and the first constitution of Tennessee.

Rec., p. 11.

4. The North Carolina confirmatory act of 1821 recites in its preamble that the line was run agreeably to the Cession

Act, and describes that part of the line in controversy as it is described in the report of the Commissioners, to wit, "from Tennessee River to the main ridge and along the extreme height of the same to where it is called Unicoy or Unaka Mountain."

Appendix, p. 16.

5. The evidence establishes that the calls of the Cession Act, the report of the Commissioners, and the confirmatory acts of both States, if followed, would locate the boundary line on and along the Hangover Ridge and the main dividing ridge around and to the east of the headwaters of the Tellico River, in accordance with the contention of Tennessee.

6. The Commissioners did run and mark a line on Hangover, and while a tentative line was probably run up Slick Rock Creek, such line was a departure from the calls of the Cession Act and not adopted by the Commissioners in their report and map or by said confirmatory acts.

7. That while the Commissioners were misled into running down the so-called State Ridge and may have crossed the Tellico River, upon discovery of their mistake and departure from the calls of the Cession Act, they adopted and reported the boundary line, as designated in said Cession Act, on the main ridge and the extreme height thereof, which did not cross but ran around and to the east of Tellico River on the extreme height of the mountain, as described in their report and the map accompanying the same.

8. As to acts of dominion or sovereignty over the disputed territory, the record shows in brief:

(*a*) Between 1821 and 1836 the disputed territory was a part of the land occupied by the Cherokee Indians, who, in 1836, ceded their land to the Federal Government, the Cherokee lands on the North Carolina side being subsequently ceded to North Carolina and those within Tennessee to her.

(*b*) In 1836 Tennessee caused her part of the Cherokee

lands—that is, said lands west of the boundary line between the States—to be laid off into a land district called the "Ocoee District." The Surveyor General of said district omitted to include the lands between the marked line on Hangover and the one on Slick Rock in his plat or survey and bounded said survey by Slick Rock Creek, but placed nothing on the plat thereof to indicate that it was the boundary line between the States (Rec., p. 8); he surveyed and sectionized the disputed territory at Tellico—that is, the lands east of the so-called State Ridge up to the main ridge—and the plat thereof indicates that **eastward** of said **sectionized** lands is the boundary line between the States.

Rec., p. 1158.

(*e*) In 1836 North Carolina surveyed out her part of said Cherokee lands eastward of the boundary line, preparatory to erecting said territory into Cherokee County, and caused a map of said territory to be made showing the boundary line between the States to be on an unbroken mountain and watershed all the way from the south bank of the Tennessee River around and to the east of the headwaters of Tellico River to the point at the Unaka turnpike where said line turns southward toward Georgia.

Rec., p. 1176.

(*d*) That the territory in dispute is wild and in many places almost impenetrable, valuable even now only for its timber, and probably uninhabited by white men prior to 1860.

(*e*) That beginning in 1842 Tennessee issued grants covering the disputed territory around the headwaters of Tellico River.

(*f*) That beginning in 1853 or 1854 North Carolina permitted entries or issued grants west of Hangover and not limited to Slick Rock Creek as the boundary line, but extending west and north of Slick Rock Creek to and beyond the

top of Little Fodderstack Ridge, thus covering the entire basin and watershed draining into said creek.

(*g*) In 1854 Tennessee passed an act authorizing entries and grants of any vacant lands in said Ocoee District, whether or not the same had been designated on the map of said district, hereinbefore referred to (Appendix, pp. 25-6), and under this act about 1,883 entries were made by and grants issued by Tennessee to McCroskey and to Morton and Griffiths which called for the line along Hangover Ridge as the boundary line between the States.

(*h*) Tennessee, by her act of 1845, creating the county of Jones, included the disputed territory within the boundaries of said county.

(*i*) Both parties have collected taxes off of the claimants of the lands in dispute, **and though neither State has acquiesced in the claims of the other,** Tennessee, in addition to the acts of dominion above stated, has sold said lands for taxes and caused the process of her courts to run into said disputed territory and permitted the residents thereof to vote in her elections.

Therefore, in conclusion, we respectfully submit that:

1. The Tennessee contention, being in accord with the North Carolina Cession Act, the act of Congress accepting the ceded territory, the Constitution of Tennessee, the report and map of the Commissioners of 1821, and the confirmatory acts of both States, should be established by decree of this court as the true boundary line between the States.

2. Even if it should appear that the Commissioners in 1821 ran and intended to adopt the present North Carolina contention either at Slick Rock or Tellico River, the line represented thereby is a manifest departure from said Cession Act and is a new line not warranted either by said acts or the acts giving instruction to and fixing the duties of said Commissioners, and that, neither said line nor any attempted compact in relation thereto having received the consent or sanction of Congress in any way whatsoever, the same are

invalid, and the decree should be to establish the boundary line as fixed and located by the Cession Act of 1789, upon and along the Hangover Ridge and Mountain and with the extreme height of the mountain around and to the east of the Tellico River.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.

CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

IN THE

PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

STATE OF NORTH CAROLINA, Complainant,

vs.

STATE OF TENNESSEE, Defendant.

APPENDIX TO DEFENDANT'S BRIEF,

owing Statutes and Parts of Statutes of North Carolina, Tennessee, and the United States Bearing on the Questions Involved in the Above-entitled Cause.

FRANK M. THOMPSON,
Attorney General of Tennessee.

SAMUEL G. SHIELDS,
CHARLES T. CATES, Jr.,
Solicitors for Defendant.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

APPENDIX TO DEFENDANT'S BRIEF.

Showing Statutes and Parts of Statutes of North Carolina, Tennessee, and the United States Bearing on the Questions Involved in the Above-entitled Cause.

North Carolina Cession Act of 1789 *as Found in the Revised Statutes of North Carolina by Battle, pp.* 172, 173.

"An Act for the Purpose of Ceding to the United States of America Certain Western Lands Therein Described.

"(Passed at the Session of 1789.)

"Whereas the United States in Congress assembled have repeatedly and earnestly recommended to the respective States in the Union claiming or owning vacant western territory, to make cessions of part of the same, as a further

means, as well of hastening the extinguishment of the debts, as of establishing the harmony of the United States; and the inhabitants of said western territory being also desirous that such cession should be made, in order to obtain a more ample protection than they have heretofore received: Now this State being ever desirous of doing ample justice to the public creditors, as well as the establishing the harmony of the United States and complying with the reasonable desires of her citizens:

"1. *Be it enacted, &c.,* That the Senators of this State in the Congress of the United States, or one of the Senators and any two of the Representatives of this State in the Congress of the United States, are hereby authorized, empowered and required to execute a deed or deeds on the part and behalf of this State, conveying to the United States of America all right, title and claim which this State has to the sovereignty and territory of the lands situate within the chartered limits of this State, west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain, to the place where Watauga River breaks through it, thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same, thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain, from thence along the extreme height of said mountain to where Nolichucky River runs through the same, thence to the top of Bald Mountain, thence along the extreme height of the said mountain to the Painted Rock, on French Broad River, thence along the highest ridge of said mountain, *to the place where it is called the Great Iron or Smoky Mountain, thence along the extreme height of said mountain, to the place where it is called Unicoy* or Unaka Mountain, between the Indian towns of Cowee and Old Chota, thence along the main ridge of the said mountain, to the southern boundary of this State." (Italics in this appendix are ours.)

Cession Accepted by United States.

The cession by North Carolina of the territory described in said cession act was accepted by the United States by act of Congress passed April 2, 1790, entitled "An act to accept the cession of the claims of the State of North Carolina to a certain district of western territory," found in United States Statutes at Large, vol. 1, pp. 106-109, inclusive.

Description of the Eastern Boundary of Tennessee, as Shown in Our Own Constitution of 1796 (*Declaration of Rights*), *Article XI, Section XXXII.*

"XXXII. That the limits and boundaries of this State be ascertained, it is declared that they are as hereafter mentioned; that is to say: Beginning on the extreme height of the Stone Mountain, at the place where the line of Virginia intersects it, in latitude thirty-six degrees and thirty minutes north; running thence along the extreme height of the said mountain to the place where Watauga River breaks through it; thence a direct course to the top of Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to the place where Nolichucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of said mountain, *to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain* to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this State, as described in the act of cession of North Carolina, to the United

States of America; and that all the territory, lands and waters lying west of the said line, as before mentioned, and contained within the chartered limits of the State of North Carolina, are within the boundaries and limits of this State, over which the people have the right of exercising sovereignty and right of soil so far as is consistent with the Constitution of the United States, recognizing the Articles of Confederation, the Bill of Rights and Constitution of North Carolina, the cession act of the said State, and the ordinance of the late congress for the government of the territory northwest of the Ohio; provided nothing herein contained shall extend to affect the claim or claims of individuals, to any part of the soil which is rocognized to them by the aforesaid cession act."

Scott's Laws of Tennessee, vol. 1, pp. 538, 539.

Act of Congress Admitting Tennessee Into the Union.

"An Act for the Admission of the State of Tennessee into the Union.

"Whereas by the acceptance of the deed of cession of the State of North Carolina, Congress are bound to lay out into one or more States, the territory thereby ceded to the United States:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the whole of the territory ceded to the United States by the State of North Carolina, shall be one State, and the same is hereby declared to be one of the United States of America, on an equal footing with the original States, in all respects whatever, by the name and title of the State of Tennessee. That until the next general census, the said State of Tennessee shall be entitled to one representative in the House of Representatives of the United States; and in all oher respects,

as far as they may be applicable, the laws of the United States shall extend to, and have force in the State of Tennessee, in the same manner, as if that State had originally been one of the United States.

"JONATHAN DAYTON,
"Speaker of the House of Representatives.
"SAMUEL LIVERMORE,
"President of the Senate pro tempore.

"Approved, June the first, 1796:
"GEORGE WASHINGTON,
"President of the United States."

Act of North Carolina, Passed in 1796, *Providing for Settling the Boundary Line Between That State and Tennessee, as Shown in Battle's Revised Statutes of North Carolina, pp.* 93, 94.

"An Act for Appointing Commissioners to Settle the Boundary Line Between This State and the State of Tennessee.

(Passed in the Year 1796.)

"Whereas it is necessary to prevent disputes between this State and its citizens, that the boundary line between this State and the State of Tennessee should be accurately and distinctly marked out and permanently established:

"1. *Be it therefore enacted, &c.,* That Joseph M'Dowell, Mussendine Matthews, and David Vance be, and they are hereby appointed commissioners, to meet the commissioners who are or may be hereafter appointed by the State of Tennessee, at such time and place as shall by the said commissioners, or a majority of them, be agreed on; and with them to settle all and every difference, controversy, dispute, and

claim that may subsist or arise between this State and the State of Tennessee with respect to the boundaries; and to fix and permanently establish the boundary line between the two States, and the same to mark and ascertain, as distinctly as possible, *agreeably to the true intent and meaning of said boundary between this State and the State of Tennessee*, as described in an Act, entitled, 'An act for the purpose of ceding to the United States of America certain western lands therein described.' And the commissioners on the part of this State shall cause an accurate plat or plan of the said boundary line to be made, specifying the courses, distances, natural and artificial marks, and return the same to the next General Assembly, to be preserved among the archives of the State. *Provided, nevertheless,* That the ascertainment of said line shall not affect the titles of any person to lands entered in either of said States. And this State will at all times hereafter ratify and confirm all and whatever the said commissioners, or a majority of them, shall do in and touching the premises, and the same shall be binding on this State."

North Carolina Act Passed in 1819, *Making Provision for Running Boundary Line Between the States, as Shown in Battle's Revised Statutes of North Carolina, pp.* 94-95.

"An Act Making Provision for Running the Boundary Line Between This State and the State of Tennessee.

(Passed in the Year 1819.

"Whereas it is essential to the interest of this State in the disposal of the lands lately acquired by the treaty from the Indians, and to the continuance of the good understanding now happily subsisting between this State and the State of Tennessee, that the boundary line between the two States should be accurately run, distinctly marked, and permanently established:

"1. *Be it enacted, &c.*, That the governor shall, and he is hereby authorized to appoint three commissioners to meet the commissioners who may be appointed by the State of Tennessee, at such time and place as may by the said commissioners, or by a majority of those representing the respective States, be agreed on, and with them *to settle, run, and mark the boundary line between this State and the State of Tennessee, agreeably to the true intent and meaning* of the Act of the General Assembly of this State, entitled, 'An act for the purpose of ceding to the United States of America certain western lands therein described.'

"2. *Be it further enacted*, That the governor, as soon as may be after the passing of this act, shall give notice thereof to the governor of the State of Tennessee, and shall request the appointment of commissioners on the part of the said State, to act with those appointed by this State in ascertaining, running and marking the boundary line between the two States; and this State will at all times hereafter, ratify and confirm all and whatsoever the said commissioners, or a majority of those of each State shall do, in and touching the premises, and the same shall be binding on this State.

"3. *Be it further enacted*, That if it shall so happen that commissioners shall not be appointed by the State of Tennessee, to act with the commissioners of this State in amicably ascertaining and marking the boundary line between the States; or if it shall happen that the commissioners appointed by the State of Tennessee shall refuse to act with the commissioners on the part of this State, the commissioners on the part of this State are hereby authorized and required to proceed in running and marking said line from the Smoky Mountain, where the line terminated which was run the year one thousand seven hundred and ninety-nine, under the direction of Joseph M'Dowell, Mussendine Matthews, and David Vance, commissioners appointed by the Act of the General Assembly of this State, passed in the year one thousand seven hundred and ninety-six, for running and marking said line to the thirty-fifth degree of north latitude, ac-

cording to the courses designated in the act of seventeen hundred and eighty-nine, entitled 'An act for the purpose of ceding to the United States of America, certain western lands therein described.' And the commissioners on the part of this State shall cause an accurate plan of said boundary line to be made, specifying the courses, distances, natural and artificial marks thereof, and return the same to the General Assembly of this State."

The remainder of the act does not affect the question in controversy.

Tennessee Act appointing Commissioners, being chapter 22 of the acts of 1820, *entitled—*

"An Act to Provide for the Appointment of Commissioners on the part of this State, to co-operate with the Commissioners appointed by the General Assembly of the State of North Carolina, to run and mark the boundary line between this State and the said State of North Carolina.

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Governor shall be, and he is hereby authorized, to appoint three Commissioners, to meet the Commissioners who have been or may be appointed by the State of North Carolina, at such time and place, as may by the said Commissioners, or by a majority of those representing the respective States be agreed on, and with them to settle, run and remark the boundary line between this State and the State of North Carolina, *agreeably to the true intent and meaning of the said Act of* the General Assembly of the State of *North Carolina*, entitled 'An act for the purpose of ceding to the United States of America, certain western lands therein described,' *commonly called the 'cession act.'*

"SEC. 2. *Be it enacted*, That the Governor, as soon as may be, after he shall have appointed the Commissioners contemplated by this act, shall give notice thereof to the Gover-

nor of the State of North Carolina of the passage of this act, together with the persons by him appointed to act with the commissioners of that State.

"SEC. 3. *Be it enacted*, That whatsoever the said Commissioners, or a majority of those of each State, shall do in and touching the premises, shall be binding on this State.

"SEC. 4. *Be it enacted*, That in case of the death, refusal to act, or resignation of any of the Commissioners hereby appointed, the Governor is hereby authorized and required, as speedily as may be, to appoint other Commissioners or Commissioner in the place of such as may have died, resigned, or refused to act.

"SEC. 5. *Be it enacted*, That the Commissioners appointed under this act by the Governor, under the authority thereof, shall be allowed for their personal services, the sum of five dollars per day, and the said Commissioners, or a majority of them, are hereby authorized to employ such surveyor or surveyors, and such chain bearers and markers as they, or a majority of them, shall deem necessary. Each surveyor so appointed shall be allowed five dollars per day; each chain carrier and marker shall be allowed two dollars and fifty cents per day; said commissioners, surveyors, chain-bearers, and markers bearing their own expense.

"SEC. 6. *Be it enacted*, That to enable said Commissioners to make advances to the persons employed by them during the progress of said running, and to compensate them at the close thereof, the Governor, by his warrant, shall direct the Treasurer to pay said Commissioners, upon their notifying him, that they are ready to proceed to the discharge of the trust hereby reposed in them, the sum of five hundred dollars, and said commissioners shall account for their application of said money to the succeeding General Assembly.

"JAMES FENTRESS,
"Speaker of the House of Representatives.
"R. WEAKLEY,
"Speaker of the Senate.

"July 23rd, 1820."

(Acts of 1820, pp. 30-11.)

Tennessee Act passed in 1821, *confirming report Boundary Line Commissioners* (*acts of* 1821, *chapter entitled*—

"An Act to Establish the Boundary Line Between T State and the State of North Carolina.

"SEC. 1. *Be it enacted by the General Assembly of State of Tennessee*, That the dividing line run and mar by Alexander Smith, Isaac Allen, and Simeon Perry, c missioners, for and on behalf of this State, and James bane, Montfort Stokes and Robert Love, commissioners and on behalf of the State of North Carolina, which divid line as run by said commissioners, begins at a stone set on the north side of Cataloochee Turnpike Road, and mar on the west side, Ten. 1821, and on the east side N. C. 18 running thence on a southwestwardly course to the B Rock, *on the summit of the Great Iron or Smoky Mounta and continuing southwestwardly on the extreme hei thereof to where it strikes Tennessee River* about seven m above the old Indian town of Tallassee, crossing Port Gap, at the distance of twenty-two miles from the beginni passing Meigs' boundary line at thirty-one and a half mi the Equovettly path at fifty-three miles, and crossing T nessee River at the distance of sixty-five miles from the ginning; *from Tennessee River to the main ridge, and al the extreme height of the same to the place where it is cu the Unicoy or Unaka Mountain*, striking the old trad path leading from the Valley towns to the Overhills tow near the head of the west fork of Tellico River, and at distance of ninety-three miles from the beginning, the along the *extreme height* of the Unicoy or Unaka Mount to the southwest end thereof, at the Unicoy or Unaka Tu pike Road, where a cornerstone is set up marked Ten. the west side and N. C. on the east side, and where a hick tree is also marked on the south side Ten. 101 M. and on

north side N. C. 101 M. being one hundred and one miles from the beginning; from thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, *below the mouth of Cane Creek;* thence up the said river the same course, about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the State of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. where was set up by said commissioners a square post marked on the west side Ten. 1821, and on the east side N. C. 1821, and on the south side G. be and the same is hereby ratified, confirmed, and established as the true boundary line between this State and the State of North Carolina.

"SEC. 2. *Be it enacted*, That this act shall take effect and be in force so soon as the General Assembly of the State of North Carolina shall pass an act ratifying and confirming the line aforesaid to be the true boundary line between that State and the State of Tennessee.

"JAMES FENTRESS,
"Speaker of the House of Representatives.
"S. BREWER,
"Speaker of the Senate.

"Nov. 9th, 1821."

(Acts of 1821, pp. 46-47.)

North Carolina Act Confirming Report of Boundary Line Commissioners, as Shown in Battle's Revised Statutes of North Carolina, Vol. 2, pp. 96, 97.

"An Act to Confirm the Boundary Line Between This State and the State of Tennessee, and for Other Purposes.

(Passed in the Year 1821.)

"1. Whereas the States of Tennessee and North Carolina, by their respective commissioners, duly authorized for that purpose, have run and marked the boundary line between the said States, in conformity with their several instructions, and being legally authorized by the States to which they respectively belong; beginning where M'Dowell, Vance, and Matthews terminated their line between the two States in the year one thousand seven hundred and ninety-nine, and agreeably to the Act of the General Assembly, entitled 'An act for the purpose of ceding to the United States of America certain western lands therein described,' passed in one thousand seven hundred and eighty-nine; and in the eleventh article, called the Declaration of Rights, of the constitution of the State of Tennessee; which said dividing line, as run by the respective commissioners, beginning at a stone set up on the north side of the Catalouche Turnpike road, and marked on the east side N. C. one thousand eight hundred and twenty-one, and on the west side Ten. one thousand eight hundred and twenty-one; running thence a southwardly course to the Bald Rock, *on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River*, about seven miles above the old Indian town Tellassee, crossing Porter's Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equinottey Path at fifty-three miles, and crossing Tennessee River at the distance of

sixty-five miles from the beginning, *from Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unacay or Unaka Mountain*, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning; thence along the extreme height of the Unacay or Unaka Mountain to the southwest end thereof at the Unacay or Unaka Turnpike road, where a cornerstone is set up, marked N. C. on the east side, and Ten. on the west side, and where a hickory tree is also marked on the north side N. C. 101 M. and the south side Ten. 101 M. being one hundred and one miles from the beginning; from thence a due course south, two miles and two hundred and fifty-two poles, to a spruce pine on the north bank of Highwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the States of North Carolina and Tennessee, making in all one hundred and sixteen miles and two hundred and twenty poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. to a square on the east side N. C. 1821, on the west side Ten. 1821, and on the south side G. The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; which line was run under the joint superintendence of commissioners appointed by the States of North Carolina and Tennessee, and a surveyor on the part of the commissioners of each State aforesaid.

"2. *Be it enacted*, &c., That said boundary line, as described in the foregoing preamble, be, and the same is hereby fully established, ratified, and confirmed as the boundary line between the States of North Carolina and Tennessee forever."

North Carolina Act Passed January 20, 1837.

Acts of 1836-7, Chapter 9, Providing for Surveying, &c., the Lands Lately Acquired by Treaty with the Cherokee Indians.

"An Act Prescribing the Mode of Surveying and Selling the Lands of This State, Lately Acquired by Treaty with the Cherokee Indians.

"SEC. 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That as soon as may be convenient after the passage of this act, it shall be the duty of the Governor to appoint two commissioners, whose duty it shall be to superintend and direct the manner in which the said lands shall be surveyed and laid off; and it shall be the further duty of the Governor to appoint one principal surveyor, of skill and integrity, with full power and authority to appoint as many deputy surveyors, chain carriers, and markers, and to employ as many pack horses as may be necessary to complete the said surveying in the most speedy and effectual manner, and the said principal surveyor shall be responsible for the conduct of his said deputy surveyors in their official duty.

"SEC. 2. *Be it further enacted,* That the said commissioners, before entering on the duty by this act required, shall give bond and security, payable to the State of North Carolina, in the sum of ten thousand dollars, conditioned for the faithful discharge of their several duties as commissioners; and the said principal surveyor shall also, before entering on the duties by this act required, give bond, with sufficient security, as heretofore required of the commissioners, in the sum of ten thousand dollars, conditioned for the faithful discharge of his duty as principal surveyor.

"SEC. 3. *And be it further enacted,* That it shall be the

duty of the said commissioners and principal surveyor to ascertain and fix upon some central and eligible site for the erection of the public buildings, which may hereafter become necessary when that portion of the State may be erected into a separate and distinct county; and to lay off four hundred acres of land immediately surrounding the said site, and to be reserved for the future disposition of the legislature (except as herein provided). It is hereby the duty of the said commissioners and principal surveyor to lay out, within the said four hundred acres of land, one acre for the public square; and shall lay off two streets crossing each other at right angles, which streets shall be one hundred feet in width; and to lay off twenty-four lots, of one-half acre each, so that each lot may be one hundred and five feet fronting the street; and three fair plats of which shall be made by the surveyor, and by him returned to the commissioners, and by them deposited as hereinafter provided for the returns of the maps of survey.

"SEC. 4. *And be it further enacted*, That it shall be the duty of the said principal surveyor, under the direction of the commissioners aforesaid, to cause all the lands of this State, lately acquired by treaty from the Cherokee Indians, to be laid off into suitable districts for the convenience of surveying, and number the said districts progressively; and to lay off and survey each district, or so much thereof as they may deem practicable, into tracts, containing from fifty to four hundred acres, and to be so laid out, where the same can be done, as that each tract may include a suitable and necessary portion of the timbered, mountainous or broken land, as will be sufficient for building fences, fuel, and other necessary purposes: And the principal surveyor shall cause to be plainly marked on the beginning corner of each tract, and fronting said tract, the number of the district and tract, as the case may be; and shall cause all other corners to be plainly marked in the usual manner; and shall cause all lines by him run to be measured and plainly marked, where the same may be practicable; and shall lay down in his field

book a fair plat of each and every tract by him surveyed, together with the district and number of the tract, as well as the quantity and quality: Being first, second, third, fourth, and fifth, as also a descriptive account of the lines and corners of each tract by him surveyed. And the said principal surveyor, under the direction of the commissioners shall cause to be surveyed so much of the said Cherokee lands as, in their opinion, will command the sum of twenty cents per acre; and the residue of said land shall remain subject to the disposition of a future legislature, and shall not be liable to be entered in the entry taker's office of the county of Macon; and when hereafter exposed to public sale, lands of the first quality shall not be sold for a less sum than four dollars per acre; and lands of second quality not less than two dollars per acre; and lands of the third quality not less than one dollar per acre; and lands of the fourth quality, not less than fifty cents per acre; and lands of the fifth quality, not less than twenty cents per acre."

The remaining sections of this act have no bearing on the controversy.

Tennessee Act of 1836, *Chapter* 2, *Making Provision for the Survey of Lands Acquired from the Cherokee Indians within the State of Tennessee.*

"An Act to Provide for the Survey of the Lands Ceded to the United States by the Cherokee Nation of Indians within the State of Tennessee, by the Treaty of the 23rd Day of May, 1836.—Passed, Oct. 18.

"SECTION 1. *Be it enacted, etc.*, That the public lands of this State, ceded by the Cherokee Nation of Indians to the United States by the treaty of the 23rd day of May, 1836, shall constitute a surveyor's district, which shall be known by the name of "Ocoee District," and there shall be appointed

by joint vote of the General Assembly, a Surveyor General thereof, who shall hold his office for three years and until his successor shall be appointed.

"SEC. 2. That it shall be the duty of the Surveyor General to engage a sufficient number of skilled surveyors as his deputies, for whose conduct in all points touching his office, he shall be responsible, whom he shall cause without delay, to run out and survey the said public lands in the manner hereinafter directed. He shall have authority to administer the necessary oaths to them, to remove them for negligence or misconduct in office, and to form such regulations for their government as may be necessary, in addition to those hereinafter prescribed for carrying this act into effect.

"SEC. 3. That before he enters upon the discharge of the duties of his office, he shall, before the judge of third circuit, enter into bond in the sum of fifty thousand dollars, with five sureties to be approved by said judge to the Governor of the State, for the time being and his successors in office, conditioned for the true performance of the duties of his office, which bond shall be lodged by said judge in the office of the Secretary of State.

"SEC. 4. That if he shall fail to comply with the conditions of said bond, the Governor for the time being, is hereby directed to cause a suit to be brought on a copy of said bond for the use of the State, and the Governor is hereby directed from time to time to assign a copy of said bond to any person or persons who may apply for the same, and who may sue on such copy, and shall be entitled to recover any damages, he, she or they may sustain by reason of a breach of the conditions of such bond, which shall not be void on the first recovery.

"SEC. 5. That he shall before entering on the discharge of his duties, take and subscribe before the said judge the following oath:

> "'I do solemnly swear that I will faithfully and correctly perform the duties of my office of Surveyor General according to the best of my skill and judgment, so help me God.'

"SEC. 6. That said district shall be surveyed in the following manner, that is to say:

"First. The Surveyor General shall establish a *basis line*, extending from a point on the bank of Hiwassee River, opposite the termination, on said river, of the main street in the town of Calhoun, south twenty degrees west, to the south boundary line of the State.

"Second. He shall run out the whole district on each side of the *basis line* into ranges six miles in width, by means of lines run parallel to the *basis line*, which ranges he shall distinguish by progressive numbers, east and west of said *basis line*, beginning with numbers one on each side of said *basis line*.

"Third. He shall then divide the said ranges by lines running at right angles with said *basis line* into townships six miles square, each numbered progressively from north to south.

"Fourth. In running the *basis line* he shall establish on it corners for townships at the distance of every six miles, and corners for sections at the end of every mile, and quarter-section corners at the end of every half mile.

"Fifth. The corner of each township shall be marked with progressive numbers from the beginning.

"Sixth. Each distance of a mile shall be uniformly and distinctly marked with marks different from those of the corners.

"Seventh. The whole of said townships shall be subdivided into sections, containing as near as practicable six hundred and forty acres each, by running through them each way parallel lines, each at the distance of one mile, and by making a corner on each of said lines, at the end of every half mile.

"Eighth. The sections shall be numbered respectively, beginning with the number one at the northeastern corner of the township and proceeding west and east, alternately through the township with progressive numbers, till the thirty-six shall be completed.

"Ninth. At each corner made as aforesaid, the surveyor shall cause to be marked on a tree or post within the section, the number of each section, and over it the number of the township and range within which such section may be, and carefully note, in his field book, the name of the corner thus marked and made.

"Tenth. *The fractional parts of townships,* wherever situated, shall be divided and numbered, as is hereinbefore directed in regard to entire townships, into quarter sections, and should there remain *fractions of quarter sections,* the number of acres contained in them shall be ascertained and noted in the surveyor's field books.

"Eleventh. All lines shall be plainly marked and measured with chains containing two perches of sixteen and one-half feet each, and said chains shall be adjusted by a standard to be kept for that purpose.

"Twelfth. The surveyor shall note in his field books the true situation of all mines, salt licks, mill seats and springs of water which shall come to his knowledge, all water-courses over which the lines he runs shall pass, with the distance from the corner of the section, and also the quality of the land, with the distance its quality continues uniform.

"Thirteenth. In each township the surveyor shall lay off and distinguish in his general plan and on his township maps, the *sixteenth section,* if fit for cultivation, and if not, then the section nearest thereto which shall be fit for cultivation, to be reserved for the use of schools, in such township forever.

"Fourteenth. It shall be the duty of the Surveyor General of said district, to have surveyed all the islands in the Tennessee and Hiwassee rivers within the ceded territory in the limits of Tennessee, and have them subdivided into quarter sections of one hundred and sixty acres each, or as nearly so as practicable, giving the number of acres in each fractional quarter, and shall note the same in his general field books.

"Fifteenth. The field books shall be returned to be kept

and preserved by the Surveyor General, who shall cause a connected plat of the whole district to be made out to be kept in his office, a copy of which he shall furnish the officer or officers who may superintend the final disposition of said land, and shall cause a descriptive plat of the whole land surveyed, on a scale of three hundred and twenty poles to the inch, to be made out and transmitted to the Secretary of State, on or before the meeting of the next General Assembly. He shall also cause a fair plat of each township to be made out, together with the sections and fractional parts of sections contained in said district, describing the subdivisions and marks of the corner, which plats shall be recorded in books to be kept for that purpose, and a copy of said plats shall be kept in his office, and at the place where said lands shall be disposed of, for the instruction of the people.'

"Sixteenth. The surveyor shall plainly mark the *basis line* and the township lines, with a blaze and a chop, above and below, on all fore-and-aft trees and near side lines, and all sectional lines shall be plainly marked with two chops on all fore-and-aft trees and side lines, and shall mark ¼ and the letter S on a stake or tree with two pointers at each corner of a quarter section on a section line.

"Seventeenth. The surveyor shall cause the whole of said district to be surveyed and the plats to be made out before the meeting of the next General Assembly.

"Eighteenth. The surveyor for his services, shall receive out of any money in the treasury not otherwise appropriated the following compensation, viz: For each and every mile by him surveyed and marked as hereinbefore required, west of the *basis line*, two dollars and fifty cents, and for each and every mile so surveyed and marked east of the *basis line* three dollars and fifty cents.

"Nineteenth. In surveying the said lines east of *basis line* it shall be the duty of the surveyor wherein gold may have heretofore been discovered, or may be discovered by him, or otherwise come to his knowledge, to run out and mark the

sections and quarter sections into forty-acre tracts, and plainly designate and lay them down on his general plan.

"SEC. 7. That the office of Surveyor General of said district shall be located at Cleveland, in the County of Bradley."

* * * * * * *

"SEC. 10. That nothing in this act contained shall be construed to authorize any entry or appropriation or right of occupancy of any of the lands hereby directed to be surveyed, and which were ceded by the Cherokee Indians by the late treaty, or to extend our laws for the entry of vacant and unappropriated lands over any part of said territory, and all entries thereof shall be null and void, till the same may be authorized by the future legislation of this State, except as hereinbefore provided."

Tennessee Act of 1837, *Chapter* 2, *Entitled An act to Dispose of Lands in the Ocoee District, Providing Only for the Entry and Grant of Lands Which Had Been Sectionized and Are Shown on the Surveyor's Map of That District.*

Tennessee Act of 1854, Chapter 22, Making Provision for the Entry and Grant of Vacant Lands in the Ocoee District.

"An Act to Dispose of Any Vacant Lands in the Ocoee District.

"(Passed Feb. 25.)

"SECTION 1. *Be it enacted, etc., That all, or any of the vacant lands in the Ocoee District* may be entered by a general entry in the entry-taker's office in the said district at Cleveland, *whether the same be designated on the map of*

said district or not. If the lands entered under the provisions of this act be designated on the map, they may be entered on the terms of paying the fees of officers, as heretofore provided; but if they do not appear on the map, the enterer shall present to the entry-taker, an entry, in writing, designating the beginning of the entry, and the prominent points or established lines, giving as near as may be the boundary, which the entry-taker shall record and preserve and furnish a copy to the enterer, who shall pay the usual fees for said service. And the surveyor of said district, or the surveyor of the county in which the lands so entered may lie, shall survey the same and make thereof a plat and certificate, from which the register of said district shall issue a grant to the claimant."

Office Supreme Court, U. S.
FILED
OCT 12 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

IN EQUITY

STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

REPLY BRIEF ON BEHALF OF THE STATE OF TENNESSEE.

FRANK M. THOMPSON,
Attorney General of Tennessee.
CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

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REPLY BRIEF ON BEHALF OF THE STATE OF TENNESSEE.

May it please your Honors:

An examination of the brief and so-called "abstract and analysis of evidence" filed on behalf of North Carolina discloses so many inaccurate statements of and interpolations into the evidence that in the time allowed for preparation of this reply we can only refer to and point out some of those which are most patent and material.

In

64th Mile Tree Not One Mile, but Only 1,820 Feet Northeast of Tennessee River.

On page 12 of the brief filed on behalf of complainant we find the following:

> "From the Cataloochee turnpike to the 64th mile tree, **about one mile northeast of the Tennessee River**, the line is not in dispute. When the commissioners reached this point they were running about south 45 degrees west. Looking from this point on the Smoky Mountain across the Tennessee River the commissioners could see the whole Slick Rock basin and the mouth of Slick Rock Creek. To the left was Hangover. Immediately in front of them was Big Fodderstack, and to the right was Little Fodderstack. The course from the 64th mile tree to the mouth of Slick Rock Creek is south 75 degrees west."

There are four distinctly **inaccurate** statements contained in this quotation, to wit:

1. As to the distance from the 64th mile tree to the Tennessee River.

The 64th mile tree was not found, but its location was attempted to be determined by measuring from the 59th mile tree, which is still standing and marked. Taking the measurement of Burns and Gannett from the 59th mile tree along the undisputed boundary line toward the Tennessee River, five miles ends just 1,820 feet from the river, and not "about one mile northeast of said river," as stated on page 12 of said brief.

The materiality of this inaccurate statement on behalf of complainant is manifest when it is considered that the mouth of Slick Rock Creek is not visible at all from where the 64th mile tree formerly stood, according to the measurement of Burns and Gannett, but it is necessary to run back from the river about a mile before a point is reached where,

even according to Burns, there is a glimpse, not of the waters of Slick Rock, but of the gorge or bed of the creek.

This statement contained on the brief of complainant is harking back to the old contention of Hopkins, Cozad, and Burns in the bill of review case, when Burns projected back from the mouth of Slick Rock Creek toward the mountain on the north side of the river a line on the supposed course of the line shown on the map of 1821, which reached the river, and which he was finally induced to admit appeared on a map filed by him in said bill of review case, a copy of which was made Exhibit "X" to his deposition in this case, and is found in the printed record at page 321. This was the original claim of Cozad and Hopkins in the bill of review case, and of North Carolina in this case, as stated in her bills, that the line departed from the extreme height of the mountain about one mile northeast of the river. Burns endeavored to deny this, but unsuccessfully, and with reluctance on his part he was induced to lay down the same line in red ink on a copy of Complainant's Exhibit "D," which is found in the record at page 336. However, this line before it reached the mountain instead of being one mile lengthened out to 5,800 feet, while along the line as measured and claimed by Burns and Gannett the distance instead of being a mile was 8,269 feet.

Rec., pp. 336, 343, 347-349, 350.

So, it seemed necessary for complainant to locate the 64th mile tree, "about a mile" northeast of the Tennessee River in order to give color to their argument, not testimony, that from such point on the mountain the commissioners of 1821 got a glimpse of Slick Rock Creek, and therefore sighted the next line to it from the end of the 64th mile, but the facts do not bear them out as to the location of the tree, and hence the whole argument based thereon falls.

2. The next inaccurate statement is that when the commissioners reached this point, to wit, the 64th mile tree, they were running about south 45 degrees west.

At a point on the undisputed line 1,820 feet from the river, where, according to the measurement of Burns and Gannett, the 64th mile tree, if standing, should have been found, the commissioners were not running south 45 degrees west, and there is absolutely no proof in this record that they were running on that course. If by that statement complainant intended to refer to the actual running as made by Burns and Gannett, the course instead of being as stated in the brief, was south 15 degrees 7½ minutes west (Rec., p. 665), which did not run either in the direction of the mouth of Slick Rock or point out Fodderstack, which was doubtless the inference sought to be suggested by the statement in regard to the course of that line.

3. Approaching the Tennessee River from the northeast along the undisputed line, Hangover is not to the left, as stated on the brief, but directly in front.

4. The course from the 64th mile tree to the mouth of Slick Rock Creek is not south 75 degrees west, as stated on said brief.

Complainant must needs pick some place to be on the crest of the mountain about a mile from the river, where a glimpse of the gorge of Slick Rock Creek can be secured along the approximate course contended for by complainant, but, as stated above, the location of the 64th mile tree, even according to the measurement of Gannett and Burns, destroys their entire argument. Taking the 64th mile tree to be 1,820 feet from the river, a course of south 75 west from such point would not run to the mouth of Slick Rock Creek, but would cross Slick Rock Creek 970 feet above its mouth, and instead of ending at the creek, pass beyond it about 1,600 feet, as shown by the red line laid down on

Exhibit "AA" to the deposition of John L. Williams, found in the printed record at page 1556, and the testimony of said Williams set out on pages 1555 and 1556 of the record. No attempt was made by complainant to dispute the accuracy of Williams' testimony on this point.

Just why it is stated on page 13 of complainant's briet that the commissioners after turning down the river from the fore and aft tree and reaching a point opposite the mouth of Slick Rock, "took the course across the stream," we cannot imagine, or just what authority there is for making that statement we do not know, because there is not a syllable of proof in this record to justify that statement.

All North Carolina Entries and Grants Within the Disputed Territory Do Not Call for Slick Rock Creek as the State Line.

On page 16 of complainant's brief, reference is made to the fact that the lands secured by North Carolina from the Cherokee Indians were not open for entry in that State until 1852, when the lands were thrown open for entry and a large number of entries were made and grants issued at once for lands lying in the disputed territory at Slick Rock. Then complainant in her brief states "in **all** these entries and grants the State line is called for as running up Slick Rock Creek." **This statement**, doubtless intended to suggest that North Carolina had uniformly and at all times claimed that the State line was at Slick Rock, as evidenced by all acts of her executive and administrative officers in dealing with land titles in that vicinity, **is directly in the teeth of the facts.**

Though some entries do call for the State line as being at Slick Rock Creek, or in that vicinity, the evidence of Hayes and Burns is conclusive to the effect that North Carolina, in allowing entries and issuing grants, had not stopped at Slick Rock, but extended some three or four miles to the west and

north of Slick Rock—to the top of Little Fodderstack Ridge and to the west thereof.

Hayes, Rec., pp. 830, 841-842.
Burns, Rec., p. 297.

Further, the above-quoted statement in the brief is shown not to be in accord with the facts by a North Carolina grant which complainant offered in evidence, but did not include in her order for printing the record (Rec., p. 76), the reason therefor being obvious in view of the testimony of A. C. Williams (Rec., p. 992). This grant No. 8234 to William H. Thomas, and surveyed by Pearcy, surveyor of Cherokee County, and much relied on by complainant, calls for beginning on a small spruce pine on the State line at the mouth of Slick Rock Creek, "and runs with the State line south 25 east 221 poles," etc. This course, instead of running with or calling for the boundary line up Slick Rock Creek, indicates and calls for the State line as running from about the mouth of said creek directly to the crest of Hangover Ridge, as shown by the testimony of A. C. Williams (Rec., p. 992), and as indicated by the green line laid down on the composite map Exhibit "B" to defendant's original brief—said green line running from the mouth of Slick Rock Creek to the Hangover Ridge.

If it had been a fact that the North Carolina entries and grants uniformly called for Slick Rock Creek as the State line, such fact would have greatly strengthened North Carolina's contention; but that does not warrant a statement so utterly in the teeth of the facts as is the quotation above set out.

Ocoee Map.

On page 16 of her brief complainant insists that Tennessee, by her survey of the Ocoee land district and the map exhibiting said survey, recognized Slick Rock Creek as the boundary between the States.

In our original brief (pp. 49-53) we discussed this question to some extent, and now we only deem it necessary to point out again that, while the Ocoee district survey stopped at Slick Rock Creek, the map thereof does not indicate that immediately east of said creek is North Carolina.

See map, Rec., p. 88.

But—and this is not noticed by complainant—the survey of the Ocoee district did cover the lands lying around the headwaters of Tellico; said lands were surveyed and sectionized as shown by the map of that part of said district which appears in the record (p. 1158), and here we call to the attention of your honors that on the plat of this part of the Ocoee district the Surveyor General of Tennessee did mark just east of the sectionized lands the words "N. Carolina"—thus indicating that to the east of the survey lay North Carolina. How significant is the absence of these words on the map showing Slick Rock Creek—a map made by the same man who made the map showing the survey around and to the east of the headwaters of Tellico River!

The North Carolina Map of 1837 Does Not Show the Boundary Line to be Along State Ridge and Crossing Tellico River.

One of the most remarkable statements in complainant's brief is that found on page 16 as follows: "The North Carolina survey and map of 1837, as well as grants made when lands in that vicinity first became subject to entry, **just as plainly claimed to the line down State Ridge and crossing Tellico.**"

Just how complainant justifies that statement it is impossible for us to imagine, because said map plainly shows a line leaving the Tennessee River on the crest of a ridge or mountain, and running on an unbroken mountain ridge around and to the east of Tellico River, and **not crossing** Tellico River at any point. A copy of this map is found in the printed record at page 1576.

It is to be noted that Tennessee served notice upon North Carolina to produce the original of this map, and also the report of the surveys from which it was compiled, but thus far North Carolina has failed to comply with said notice; therefore we submit that the fair inference is that said surveys would not sustain North Carolina's contention, but would show, as does the map compiled by North Carolina's Surveyor General from said surveys, that the boundary line as then claimed by North Carolina, runs to the east of the headwaters of Tellico River and follows an unbroken mountain course to the Tennessee River.

As to the presumption against a party withholding competent and pertinent evidence, see *Kirby vs. Tallmage*, 160 U. S., 379; *Pacific Construction Co. vs. B. W. Co.*, 94 Fed. 180.

Tree Number 30.

We have fully discussed the marking on this tree on pages 105 to 107 of our original brief, and we will only note the statement contained on page 18 of complainant's brief that there is no evidence that any survey was ever made in this country before 1821; but this record does show, as pointed out in our original brief, other trees bearing State-line marks made in 1821, which are off of and away from the contention of either of the parties in this cause.

Burns' Pine Tree Near the Mouth of Slick Rock Creek.

On page 19 of her brief complainant says in substance that the line crossed the Tennessee River to a point about twenty yards below the mouth of Slick Rock Creek, where there was a large pine tree that bore State-line marks.

Just why the commissioners or any one else should have in the abundance of timber in that locality, gone to a point twenty yards below the mouth of the creek rather than to the creek itself it is somewhat difficult to imagine.

It is claimed that this tree is one called for in the Davenport notes, and its location is predicated upon the testimony of Dr. Patton and the always ready Burns.

Dr. Patton testifies to too much, and Burns is flatly contradicted by one of complainant's own witnesses. Dr. Patton, examined in the old case of Hebard *vs.* Belding, testified that he followed a marked line **to within 300 or 400 yards of the head of Little Slick Rock Creek,** which would be some two miles off of North Carolina's present contention; that then he concluded that the line ran "down the ridge between two forks of Slick Rock;" that four or five miles from the Tennessee River he found an old line leading down by the creek just outside of the laurel as near the creek as they could get along, and traced it down the creek that way to the creek's mouth, and found a large pine tree marked ten or twelve steps below the mouth of Slick Rock; that the marks were not distinct, but were "old marks" (Rec., p. 869).

This marked line traced by Dr. Patton down Slick Rock Creek "outside of the laurel," and as near the creek as they could get but for the laurel, is manifestly not the line run up Slick Rock Creek by Burns, which crossed said creek back and forth twelve or fifteen times, and is additional evidence of other lines in that same locality, many of which were doubtless made by Indians, whose habit of imitation oftentimes led them to making marks on trees similar to those made by white men. In any event, this Dr. Patton line is not in accord with the Burns line. Moreover, Patton says he followed a marked line down the creek and outside of the laurel for a distance of about five miles, when the undisputed facts are, as shown by the testimony cited in our original brief, that for a distance of somewhat more than three miles along Slick Rock Creek not even Burns or Gannett was able to find any marked trees—not able to find a semblance of a marked line.

Now, it is true that Burns did claim that after the dis-

covery of the Davenport notes he made another expediti into the disputed territory (no doubt for the purpose finding a pine at or near the mouth of Slick Rock), a he found on the south side of the river about twenty-five f from the water's edge, both of Tennessee River and Sli Rock Creek, a large white pine, but he "could not det mine anything satisfactory in regard to marks * * and there was no way of determining whether or not it w the original State-line mark" (Rec., pp. 726-727).

He then stated that this tree had been "blown up by t roots and the whole tree lies right down the Tennessee Riv The whole tree is there yet" (Rec., p. 727).

On this expedition Mr. Burns had carried along with h a Mr. Slagle, who was introduced by complainant, and cross-examination he stated that he and Burns found a "pi stump" below the mouth of Slick Rock Creek; that abo three feet of the same was above the ground, and that t tree had not been cut down or broken down; that there w not any marks on the same, and there was not any part the tree there from which to ascertain whether it had be marked or not (Rec., p. 767).

Alleged Bearing to Big Fodderstack.

On page 23 of her brief complainant says that the be ing of the map of 1821 to Big Fodderstack is south 43 grees and 25 minutes west. But this is arrived at by Bu arbitrarily selecting a certain point on the map of 1821 Big Fodderstack (Rec., p. 241), as he did other points order to bear out his argument. It is to be noted that th is no point on the map of 1821 designated as Big Fodd stack or Junction or County Corners, yet Mr. Burns has sort of difficulty in assuming the exact location of each these places on said map, and having thus furnished hi self with a predicate he proceeds with his argument in fa of the complainant.

And just here, inasmuch as complainant, or rather Burns for Hopkins and Cozad, insists and reiterates that Big Fodderstack is in the same general direction of the boundary line as it approached Tennessee River as shown on the map of 1821, that claim is effectually disposed of and shown not to be in accord with complainant's contention by an extension of the boundary line crossing said river, as shown on the map of 1821, to a point about seven miles to the southwest thereof, according to the scale of said map. This was done upon Exhibit "A" to Onley Williams' deposition (Rec., p. 76) by John L. Williams, as shown in his testimony on page 1475 of the printed record.

It is to be noted that defendant in cross-examining Burns had him to locate on said Exhibit "A" to Williams' deposition his claim as to that part of the map which showed Fodderstack, and the line crossing the river extended the proper distance runs back three and a half miles west and north of where Burns located Fodderstack on said map of 1821, but does run to and about the place where defendant insists Fodderstack appears on said map—that is, to a range or ridge running almost at right angles to the boundary line.

The delineation of the Hangover ridge and the location of Hangover and Stratton Bald on Exhibit "A" to Williams' deposition, which was done by Burns under his cross-examination by defendant (Rec. pp. 328-332), showed the absurdity of complainant's claim, and would cause the stream marked creek, if it be Slick Rock, according to the contention of complainant, to run principally to the east of Hangover, and before it reached the Tennessee River to cross the Hangover ridge where it is perhaps two thousand feet above the river and above said creek as it actually lies on the ground.

Map of 1821 Further Misconstrued by Complainant.

On page 23 of her brief complainant states that "according to the North Carolina contention the line crosses the Tennessee River at the mouth of Slick Rock Creek, and unless

you absolutely disregard both the course and distance and the creek shown on the map you can cross at no other place."

We have already shown in our original brief that the map cannot be relied on either for specific course or for exact or even approximate distance, but the fact is, as we have shown in our original brief, the map does not show the line crossing the river **at** the mouth of any stream, but according to the scale of said map the line crosses the river, not at the mouth of the stream marked "Creek," but sixty poles or 990 feet below the mouth of the stream marked "Creek."

Rec. pp. 1174-5, 1197.

Complainant wholly ignores the report of the commissioners, which though it called for crossing the Hiwassee River at the mouth of an insignificant little stream called Cane Creek, nevertheless makes no reference to the mouth of any stream where the boundary line crosses the Tennessee River.

Is not this significant against North Carolina's contention?

Every surveyor offered by North Carolina says that if he had run and adopted a line crossing the Tennessee River at the mouth of a creek he would have shown that fact in his report.

Complainant in her brief on page 23 further states that "according to the Tennessee contention immediately after crossing the river the line runs up a ridge," and this is correct, but then complainant adds, "the map shows that it runs up a creek for a considerable distance."

Your honors will see even from the copies of the map of 1821 found in this record, but much better from the original map itself, that while immediately south of the river the boundary line does appear to be near, and perhaps for a mile and a half almost parallel in its general course with the stream marked "creek," nevertheless, the etching or hatchures on said map show, as contended by Tennessee, that immediately after crossing the river the line runs on a ridge, and this is admitted by no less authority than Mr. Gannett.

Rec. pp. 477, 478, 440.

Indeed, many significant admissions were wrung from Mr. Gannett after he had been confronted with the inaccuracies (?) in his testimony in relation to the maps in the Congressional Library, pointed out in our original brief.

The Davenport "Secretary."

In order, as we suppose, to show that the so-called Davenport notes were found in a proper place or receptacle for such valuable papers, complainant, on page 25 of her brief, refers again and again to the famous old Davenport "secretary," which unfortunately, as shown by Mrs. Cilley, was not a secretary at all, but was an old sideboard, and a most unlikely piece of furniture to have been used by Colonel Davenport as a writing desk. Moreover, Mrs. Cilley states that the old Davenport **secretary** had not been in the Davenport house for 30 or 35 years—and was not in the house when it was claimed that William Davenport Jones and his brother, Edmund Jones, found the so-called Davenport notes on November 10, 1910.

Rec., pp. 640-641.

We do not undertake to explain these discrepancies or their materiality; however, they do show that the Davenport notes did not come from an old writing desk, and complainant also failed to produce Mr. Edmund Jones, who is supposed to have been with his brother on November 10, when the so-called field-notes were found, and they did not deem it advisable to inform Mrs. Cilley, although she was in the house at the time, and was used by North Carolina as a witness to the handwriting found in said book.

The Bluff on the South Side of the Tennessee River Opposite the Fore-and-aft Tree on the North Bank is Not "Insurmountable."

Complainant, on page 27 of her brief and elsewhere, refers to the bluff opposite the fore-and-aft tree as being "insurmountable," for the purpose doubtless of suggesting an inference that neither the commissioners nor either of the surveyors in 1821 could have "scaled" that bluff, and consequently did not run or mark a line along Hangover Ridge.

While from the north bank of the river the blunt end of Hangover Ridge has the appearance of a bluff, nevertheless it is by no means insurmountable, and some of the surveyors in this case testified to having gone up that bluff to the ridge, or down the bluff to the river from the ridge.

Rec., pp. 1652, 1656.

The Davenport Field-notes Calling for a Creek and the Tennessee Contention.

After following the so-called Davenport field-notes, as it is claimed, across the river to or near the mouth of Slick Rock Creek, complainant says: "The succeeding calls take you up a creek for several miles, and this again accords with the map, the marked line and the North Carolina contention while there is nothing in the Tennessee contention that remotely resembles the calls of the field-notes from the 65th to the 70th mile."

Tennessee admits that the "succeeding calls" do run up a creek for some four or five miles, and that there is nothing in the Tennessee contention that even remotely resembles such calls for a creek, but Tennessee denies, and the evidence and record is with her, that these calls accord with the map of 1821, as stated by complainant. As we have already stated, the map shows the line to leave the river about 990 feet below the mouth of some stream, and

that from the river it proceeds or runs on a ridge near to said stream, and practically paral'el with it for perhaps a mile and a half, and then, as is admitted even by Burns, the boundary line from a distance of one and one-half miles proceeds southwestwardly on the crest of a mount, and not along any stream or creek. According to the North Carolina contention, within one and a half miles from the river on the south side the boundary line crosses Slick Rock Creek several times, but we apprehend that none of the counsel for complainant can be found to stand before your honors and claim that according to the map the line does anything of that sort.

The end of the second mile south of the river, according to the North Carolina contention, is directly on Slick Rock Creek, while the second mile circle south of the river on the map of 1821 is fully a mile and a quarter west of the stream marked creek.

According to Burns' contention for North Carolina the end of the 68th mile and the 68th mile tree stands on a little island in the **middle** of Slick Rock Creek, while according to the map of 1821 the third mile circle south of the river is nearly two miles west of the stream marked **creek.**

Can it be imagined that a **surveyor** locating a mile tree in the middle of a stream would then draw a map showing that mile tree to be two **miles west of the stream?**

According to the North Carolina contention and the Davenport notes the 69th mile tree is on the **east** bank of this stream, which is claimed by North Carolina to be Slick Rock Creek, while the map of 1821 shows the 69th mile circle to be not on the east bank but about **two and a half miles west of the stream marked "creek."**

Indeed, running south from the river the boundary line is shown for the first mile and a half to be on the side or crest of a ridge, and then along the crest of the main mountain, as called for in the Cession Act, the report of the commissioners and the confirmatory acts.

"The Tellico Section."

On page 27 of complainant's brief appears the remarkable statement that:

> "The evidence is plenary that in the Tellico section the notes accord with the map, the marked lines and the North Carolina contention."

We have discussed the question of the marked lines in the Tellico section in our brief, and will not further enlarge the brief by restating our position in regard thereto, but even a casual examination or comparison of the map of 1821 with the Davenport notes or the North Carolina contention, shows the gross inaccuracy of the statement that the map accords with said contention or said notes. The face of the map shows a line on top of the mountain and to the east of the headwaters of Tellico River—that is admitted even by Gannett.

And it being established that the map shows a line on the main divide of the mountain around and to the east of the headwaters of Tellico River, there can be no reconcilement between that map and the North Carolina contention—the two are utterly inconsistent.

An Interpolation Into the Report of the Commissioners of 1821.

In the strained effort to show agreement between the so-called Davenport notes and the commissioners' report, complainant goes to the length of interpolating into said report a statement, the materiality of which is thus recognized by complainant, and the absence of which from said report practically destroys complainant's contention.

On page 28 of her brief complainant states that "**the report of the commissioners calls for the following objects * * * a large creek emptying into the Tennessee River where the line crosses that river.**"

The original report will be before your honors on the argument of this case, and several copies thereof are to be found in the printed record, one of which appears on pages 51 and 52.

We challenge the ingenuity of learned counsel of complainant, or even the resourceful Mr. Burns, to point out where in said report the commissioners called for "a large creek emptying into the Tennessee River where the line crosses the river." It is the very absence of any such call in the commissioners' report that shows the great improbability, if not impossibility, of complainant's contention.

Each and all of the expert witnesses in this cause testified that the commissioners had in fact crossed the Tennessee River at the mouth of the stream, and then run along that stream for any distance, such fact would and ought to have been noted in the report. That the importance of such a call was well known to the commissioners is obvious not only because they were men of intelligence, but because when under such conditions they crossed Hiwassee River "below the mouth of Cane Creek" they reported that fact in express words. The attempted interpolation of this call to the report of the commissioners shows the desperate straits to which complainant has been driven to bolster up her case—and demonstrates that she recognized its weakness in the absence of such a call or description in the report of the commissioners.

We have in our original brief noticed some of the discrepancies between the map and the Davenport notes and some of the natural objects called for on page 28 of complainant's brief, and we will not restate such matters.

However, we do call to the attention of the court that not one single natural object claimed by North Carolina along her contention on the disputed boundary is established. Her claim in relation to the alleged holly 86-mile tree we have fully answered in our original brief.

Judge Clark's Decision.

On pages 30 and 31 of her brief complainant sets out what, after an examination thereof, might appear to be the whole of Judge Clark's decision, but complainant omitted the most material part thereof, which immediately follows, on pages 1384-1385 of the record, that part quoted by her, and in summing up Judge Clark expressly held that the weight of the evidence was with the complainants. We set out his entire opinion, including that part quoted and the remainder omitted by complainant:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the facts that they obtained their grant earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise growing out of the fact that the State has, through the Ocoee district commissioners, established its line at Slick Rock Creek, and has sectionized all the territory supposed to belong to the State. In the absence, however, of any ground on which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the State line. I do not underestimate the great force found in the better marked line of the defendant. It must not be forgotten, however, that the commissioners in surveying and making the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous

range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless, it would have been so natural and not necessary to avoid misleading for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given it would be impossible to run the line as claimed by the defendants.

"Looking at the case then from the legal point of view (and no other, it seems permissible), I am certain that by the weight of the evidence the case is with the complainants.

"As I concur with the commissioner in the reasons which he gives, as well as the conclusion at which he arrives, it is not necessary that I should go over the grounds separately. It results therefore that the exceptions to the commissioner's report are overruled, the report confirmed, and decree will go accordingly."

Judge Severens' Dissenting Opinion.

We have not deemed it necessary to analyze Judge Severens' dissenting opinion, and only notice the material statement contained in the quotation therefrom set out on pages 33 and 34 of complainant's brief, as follows:

> "The map shows the line run by the commissioners in distinct color, and it shows the line as it was contended to be by the defendants in the original case," etc.

Defendants Belding and others in the original case had first contended that the line ran along Little Fodderstack Ridge, but finally settled down to a contention along Slick Rock Creek. We are not familiar with what appeared in the record in the Court of Appeals when the case was tried and the decision reported in 194 Federal Reporter, but we are surprised to learn that it was made to appear therein that Slick Rock Creek was along the crest of the mountain, because if, as we have it admitted by Mr. Gannett, the map of 1821 shows anything, it shows that from the river running southwestwardly the line is on a ridge or the side of a ridge for the distance of about a mile and a half, and then it is on the crest of the main mountain.

What was made to appear to that able, learned and conscientious jurist, we are unable to say, but the fact remains that the map shows a line on the crest of the mountain, and not along the creek or a stream of any kind for a distance of five miles, as was claimed in the Hebard-Belding litigation, and is now claimed by complainant in this case.

"Reputation Evidence."

In addition to our discussion of the "reputation" evidence set out in our original brief (pp. 54-67), and in reply to that part of complainant's brief found on page 35, we desire to refer to only two facts.

John W. Stratton, to whose testimony we referred in connection with the controversy at Tellico River, is probably the oldest witness examined in this case. When he testified in November, 1910, he was about 83 years old (Rec., p. 1029), so that he was born in 1826 or 1827. The Stratton family were North Carolinians, who, prior to coming to Tennessee, lived in the territory contiguous to the State line. The Stratton family lived for a considerable time on or near to the Stratton Meadows, which are on an undisputed part of the boundary line between the Slick Rock and Tellico

contentions. The grandfather of this old gentleman who testified in this case was buried by his request on the boundary line, so that part of his grave is in North Carolina and part in Tennessee. One of the older brothers of John W. Stratton, whose name was Bob Stratton, lived in North Carolina just under the Hangover Mountain, and the Bob Stratton Bald, which joins and is, indeed, a part of the Hangover Mountain, took its name from this brother of John W. Stratton. Away back in the early part of the 40's, when John W. Stratton was a young man, he was all over and became familiar with the territory in dispute, and his brother, Bob Stratton, from whom Stratton Bald got its name, told him that the State line ran up the Hangover Ridge.

Rec., p. 1034.

In our original brief (p. 64) we have referred to the testimony of James L. Nelson, who was before the Civil War well acquainted with and the agent of William H. Thomas, and Nelson's testimony in relation to what Thomas told him (Rec., pp. 938-939) as to the State line being on the ridge—that is, Hangover Ridge—between Slick Rock Creek on the west and Bear Creek on the east, is borne out by Thomas' grant No. 8234, which was surveyed by Pearcy, and to which we have hereinbefore referred, the first call of which runs from down near the mouth of Slick Rock straight up to the Hangover Ridge, reaching the crest of the ridge perhaps a half or three-quarters of a mile southwest from the river, as shown by the short green line on Exhibit "B" to the original brief.

Cheoee River.

In relation to the stream marked "Creek," shown on the map on the south side of the Tennessee River, complainant on page 45 of the brief says:

> "No stream in that part of the world actually coincides with this line, even for the distance shown on

> the map, except Slick Rock Creek, and Slick Rock Creek actually coincides with the map for the several miles of distance."

This statement Tennessee challenges.

We have already shown that the location of the stream marked "Creek" on the map of 1821 is absolutely inconsistent with the location of Slick Rock Creek, as it runs on the ground; there is absolutely no similarity between them.

In our original brief (pp. 108-111) we have shown that Cheoee River, or Creek, as it is sometimes called, as it runs on the ground, approximately conforms to the location of the stream marked "Creek" on the map of 1821.

Speaking to this point, Judge McCall, in the Circuit Court at Knoxville—the opinion being reported in 194 Federal, 301—said:

> "From the location of this stream marked creek on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoee River and not Slick Rock Creek."

The Attitude of the Surveyors Named by Complainant.

On page 46 of her brief complainant gives the name of a number of surveyors, all of whom she insists acted independently of each other, and adopted the line up Slick Rock Creek as the true boundary between the States.

We have already shown that Mr. Percy, or Pearcy, formerly county surveyor of Cherokee County, in surveying the Thomas grant No. 8234, called for the State line as running from near the mouth of Slick Rock Creek (Rec., p. 992) south 25° east, which carried it up to the top of Hangover ridge. In our original brief we show how Mr. Hayes, prior to his employment by Belding, was of the opinion that the line was west of Slick Rock Creek; indeed, that the "tradition" in North Carolina was that the line ran up to the Little Fodderstack ridge. The other surveyors named made

no independent examination of other localities before they went directly, under the employment and direction of Belding, as we have shown in our original brief, to Slick Rock Creek, and there ran and attempted to locate the boundary line; but both Hayes and Hyde admit, as we have shown in our original brief (pp. 69-73), that had they been running the line according to the North Carolina contention **they would have noted the turn down the river on the north bank,** and also that it ran up Slick Rock Creek; they further admit, in substance, **that if they had run according to the calls of the act of 1821,** from the marked fore-and-aft tree on the north bank of the Tennessee River opposite the Hangover Ridge, **they would have gone the most direct way or line to the Hangover Ridge—that is, Hangover.**

Rec., pp. 807-808, 844, 845.

Mr. Slagle, who was taken there by Burns, made no sort of a survey; does not even claim to have made any survey, and when stressed in his defense of North Carolina's contention he was driven to contend that **the map of 1821 "don't conform with the contention of North Carolina or Tennessee either, at all."**

Rec., p. 773.

Brief on North Carolina Contention at Tellico.

That part of complainant's brief dealing with the contention at Tellico, except for casual references elsewhere, covers only about three-quarters of page 47 of said brief.

Hopkins and Cozad are interested only in the lands covered by the disputed territory between Hangover and Slick Rock, and it is to be borne in mind that this was the only dispute or controversy mentioned in the original bill which Hopkins and Cozad had procured North Carolina to institute under a bond guaranteeing complainant immunity from costs and expenses. It was not until the Babcock Land & Lumber Company sought to intervene and showed the

private nature of the controversy that the amendment was asked for covering the so-called dispute at Tellico.

Complainant in respect of this controversy practically contents herself with the statement found on page 47 of the brief—in addition to her reference to the case of Stevenson *vs.* Fain—with the following statement:

> "If there is a reply attempted to this portion of the map of 1821 on the part of Tennessee it has escaped us."

Lest our discussion of this question in the original brief may also escape complainant, we take the liberty of here stating that Tennessee's contention is that the true boundary line follows according to the calls of the Cession Act, of the report of the Commissioners, and of the confirmatory acts of both States, the extreme height of the main ridge of the mountain, which is shown by Mr. Gannett to be around the headwaters of the Tellico River by way of McDaniel Bald, and Tennessee insists that the map of 1821 shows the boundary line to be on the crest of a mountain entirely east of the headwaters of Tellico River.

Further, Tennessee insists that North Carolina in 1837 by the map which in that year she caused to be made, recognized the true boundary line as being on the crest of the mountain, and to the east of the headwaters of the Tellico River.

Complainant's Misconception of Tennessee's Contention.

On page 50 of her brief complainant undertakes to somewhat chide defendant and to point out her duty in relation to setting up her contention, and then, doubtless to her own satisfaction, complainant insists that apparently Tennessee has not so apprehended the matter—as complainant would have her—and has not always been consistent in respect of her claims as to the location of the true boundary line.

The complacency and assurance of this proposition is admirable.

As we have shown, North Carolina has changed her contention some four or five times, and doubtless it is to divert attention from her acts in this respect she now claims or suggests that Tennessee has been in like position.

We challenge this—whether it be a charge or a suggestion, because from the beginning of this controversy Tennessee has insisted that the line passed directly from the fore-and-aft tree on the north bank of the river on the same course running through said tree, crossed the Tennessee River, thence along the Hangover Ridge and Hangover Mountain, to the undisputed boundary southwestwardly. Tennessee never contended, even after the finding of the map of 1821, that the boundary line crossed the Tennessee River "**at** the mouth of a large creek on the south bank"—nor did she contend or endeavor to show that the line crossed the Tennessee River **at** the mouth of Cheoee River. The map does show, according to its scale, that the boundary line crosses the Tennessee River **about one thousand feet below the mouth of a stream**—not **at** the mouth of the stream, and inasmuch as it is admitted that the streams on said map of 1821 were not located thereon by actual measurement, Tennessee has insisted and does insist that it is established that the stream to the eastward of the boundary line, as shown on said map of 1821, is Cheoee River or Creek. The reasons for this we have heretofore in our original brief fully set out.

On page 53 of her brief complainant undertakes to quote the contention of Tennessee, but whether intentionally or by inadvertence omits the most material call controlling the location of the boundary line just south of the Tennessee River. If complainant had not left out of that quotation where some "* * *" are inserted, the words "**from Tennessee River to the main ridge,**" the contention of Tennessee would have been more accurately and intelligently stated, and it would have been as it is. In other words, Tennessee's contention is that the boundary line follows the summit of

the Great Iron or Smoky Mountain on the extreme height thereof to where it strikes the Tennessee River—then **from Tennessee River to the main ridge,** and along the extreme height of same to a place where it is called the Unicoy or Unaka Mountain.

Of course, no one ever contended that the boundary line crossed the Tennessee River on the extreme height of a mountain as that question is solemnly discussed on pages 51 and 52 of complainant's brief, but Tennessee does claim that the boundary line, according to the calls of the Cession Act, runs along the extreme height of the Great Iron or Smoky Mountain, and that it approaches the Tennessee River from the north on the extreme height of said mountain **at the particular place** where it goes down to the river—as was reported by the commissioners, and as is stated in the confirmatory acts of both States, and then, as reported by the commissioners of 1821, the line runs from the south bank of the river immediately opposite the fore-and-aft hemlock tree to the main ridge, which the evidence indubitably establishes to be Hangover, and thence along the extreme height of said main ridge, which would carry it around to the east of the headwaters of Tellico River by way of McDaniel Bald to the Unicoy or Unaka Mountain, and there can be no doubt but that the mountain was not called Unaka until that part of the main ridge was reached around to the west of the headwaters of Tellico.

Now, returning to the line just northeast of the Tennessee River: The boundary line from the northeast approaches the river upon the extreme height of the Smoky Mountain at that particular place, and we challenge this record for any evidence to the contrary. It is true that in his desperation Burns would have had the inference drawn from some of his statements that there was a spur northeast of this which broke off and went to the Tennessee River several miles below Slick Rock, but that this was pure guesswork, and without basis of fact to support it, appears from his admission that he himself had never been back on the moun-

tain far enough to see the ridge or spur he was talking about. Northeast of the river there has never been a doubt but that the line ran where Tennessee claims it to be, along the extreme height of the mountain.

Complainant in her brief has a good deal to say about prongs or branches, or branch ridges, and that the Cession Act does not call for the highest prongs or highest branch, but the Cession Act and the report of the commissioners do call for the extreme height of the mountain, and that call is answered in every respect by the contention of Tennessee.

Complainant on page 52 of her brief reiterates in different form her insistence that the Fodderstack Ridge has a greater average height or continuity of height than the Hangover Ridge, along which Tennessee's contention runs. In reply to this we merely call attention to the reluctant testimony of Mr. Gannett (Rec., p. 471), where he was made to show the respective elevations of the North Carolina and Tennessee contentions at intervals of one-half mile from Tennessee River for a distance southwestwardly of seven miles, and he then admitted that the greater average elevation was with the Tennessee contention.

See Original Brief, pp. 101-102.

In regard to the contention at Tellico, we find on page 53 of complainant's brief the remarkable statement that "**in the Tellico country the extreme height of the mountain has been followed in the contention of North Carolina.**"

In reply to this we merely call to the attention of your honors the map Exhibit No. 1 to the deposition of W. D. Hale, found in the printed record at page 1144, whereon, in red ink, are inserted the elevations along the North Carolina or State Ridge contention, and also those along the Tennessee contention, that is, on the main ridge around the headwaters of Tellico—the main dividing ridge—and these elevations show beyond question that the statement just

quoted from complainant's brief is without any sort of basis in fact to support it.

Indeed, it is nowhere contended by any of the evidence of complainant that the line which the commissioners were perhaps misled into running down a ridge which lost itself before it reached the Tellico River, was the extreme height of the mountain.

Nor do we remember any testimony whatsoever that justifies the statement that said ridge, "**ever since 1821,**" has been known as State Ridge. Some of the witnesses say that this appellation was given to said ridge about the time this controversy arose, but others carry the name back some fifty or sixty years, which would be about the time the Fains began to enter land in the disputed territory around Tellico, and that they are adepts in the manipulation of evidence in regard to the location of the State line is shown by the fact that in the case of Stevenson *vs.* Fain they made it appear that the line reached the main mountain at Bryson's Gap, while the evidence in this case shows that they were waiting for Messrs. Burns and Gannett at Jenks Knob, and carried them down from thence to the so-called holly 86-mile tree, in respect of which they adduced such proof in Stevenson *vs.* Fain as to cause the court to find that said tree had been blocked, when as a matter of fact no blocking of that tree was ever made or could have been made, because of its hollow condition, as is unquestionably established in this record.

The "**Abstract and Analysis of the Evidence in the Record**" prepared by the State of North Carolina is so variant in many material particulars from defendant's understanding of the testimony, that it could serve no good purpose to challenge statement after statement throughout said entire so-called abstract, and moreover questions of fact, we apprehend, will be determined by your honors' reading and consideration of the testimony itself.

We submit that while it was perhaps not unnatural for complainant so to do, nevertheless throughout said abstract

she magnifies and states with great detail her own testimony, while minimizing and omitting material parts of the testimony of the defendant.

Further, some parts of said abstract might lead one to the conclusion that it was not prepared by any one familiar with the record or with the record before him.

To illustrate: On page 95 of said abstract appears the solemn and serious statement that one of the defendant's experts, C. B. McNabb, "is **not** a surveyor," when, if the abstractor had examined the very page of the record referred to and the succeeding pages, he would have discovered that Mr. McNabb is a surveyor of some thirty years' experience, has been the official county surveyor of Cocke County, Tennessee, for sixteen years, has surveyed the boundary between the States along the eastern boundary of GreeneCounty, Tennessee, except one tract, and has surveyed the boundary line southward from the Cataloochee turnpike—the beginning of the survey of 1821—to the fiftieth mile tree.

This witness gave a vivid description of the appearance of Hangover, the main mountain, to one going down the State line on the north side of the Tennessee River toward the river.

Rec., pp. 1525, 1526.

And instead of testifying that he had never done any blocking, as stated in said abstract on page 95, he modestly admitted that he had done blocking—perhaps not over twenty trees—and that he had carefully examined the marking on tree No. 30, which was claimed by Burns to be two hacks and a blaze, and he was satisfied that these marks were four hacks and that there was no blaze accompanying them.

Rec., pp. 1527, 1528.

It was the testimony of this witness, if any were needed, which showed that the map of 1821 could not be relied on in the matter of distances, because he testified that, in running the boundary line from the Cataloochee turnpike to the

fiftieth mile tree—which should have measured out fifty miles—he found the distance to be three and one-tenth miles over, and that this excess of distance was principally between Meigs boundary line, which crossed the State boundary line at thirty-one and a half miles, and said fiftieth mile tree. In other words, there was an excess of three and one-tenth miles in running eighteen and one-half miles.

Rec., pp. 1522, 1523.

The so-called Davenport Field Book (Rec., pp. 624-633) indicates that the commissioners were on this line from Cataloochee turnpike to the Georgia line only thirty-five days, inclusive of Sundays and other days, when, because of inclement weather, they could not work, and Mr. McNabb was of the opinion that this line could not have been run under from forty to fifty working days.

Rec., pp. 1529, 1530.

This witness was not even cross-examined on behalf of complainant, and now it is sought to destroy the effect of his testimony by stating that he was **not a surveyor.**

John L. Williams:

Equally subject to criticism is the abstract of the evidence given by John L. Williams.

Williams in his testimony discloses that fairness and candor which should always come from an honest witness.

On page 82 of said abstract it is stated that Williams testified or said: "If he were running up a creek, he would **not** note the creek," when in fact it is shown on the very page of the record cited in the abstract (Rec., p. 1417) that he answered directly to the contrary. The question was:

> "Q. 122. If you were going to do that and run up the stream five miles to a given point and then with the ridge to another point, **would you have noted that stream in your map and report?**
>
> "A. **Certainly.**"
>
> Record, p. 1417.

On page 81 of said abstract Williams is made to say that after he had sighted back to Parson's Bald and then turned the instrument and found that Fodderstack was to the right and Hangover to the left of his line of sight, "he then determined that the line was to the left after leaving Tennessee River," when he said that he "then examined the map and found that the map showed there was a turn to the left * * * at about the river."

Record, pp. 1408, 1409.

Said abstract omits all reference to the cogent reasons given by Mr. Williams for his reaching the conclusion and determining that Hangover is the main ridge. These reasons are set out on pages 1411 and 1412 of the printed record and will not be here repeated.

Said abstract omits all reference to Williams' explanation and testimony in relation to the beginning of the etchings or hachures on the map of 1821, set out on page 1414 of the record, as follows:

> "Q. 297. Look at this etching which is south of the river, as shown on this map, and on the west side of both the boundary line as laid down on the map and also of that stream marked 'Creek.' What does that etching or those hachures show?
>
> "A. That indicates to me that there was a ridge to the right of where they went up from the river or to the southwest, which would correspond to the actual conditions, going right across the river from the hemlock and up to the top of Hangover Ridge; that is, the Hangover Ridge goes right on down between the river and Slick Rock Creek to the mouth of Slick Rock Creek, going directly across the river from the hemlock to the top of the Hangover Ridge, the point of the main ridge is to the right or to the west of the line. So that would very well represent the actual conditions if they had gone right across the river from the hemlock and up to the top of that ridge."
>
> Record, p. 1414.

Further, Williams' testimony as to the Hangover, Fodderstack, and Little Fodderstack forming the watershed for Slick Rock Creek, and that the maker of the map of 1821 omitted all of this, if the stream marked "Creek" on said map was meant for Slick Rock Creek, as set out on pages 1418 and 1419 of the printed record.

Further, Williams' comparison of elevations along the Hangover Mountain and the Fodderstack Ridge, as set out on pages 1420 and 1421 of the printed record, are not even referred to.

On page 82 of the abstract he is made to say that he thinks the commissioners went over Hangover **because** it is the most direct way, when that is only one of the reasons given by him, and he states that he would have gone to the Hangover Ridge in the most direct way and then along Hangover Ridge over Hangover.

Record, p. 1424.

Further, said abstract makes no reference to Williams' testimony to the effect that in going directly across the Tennessee River from the marked fore-and-aft hemlock along and over Hangover would comply with the commissioners' report and the confirmatory acts of both States, and that following Burns' line up Slick Rock Creek would not so comply, which testimony is set out on pages 1425-1428 of the printed record.

Further, said abstract omits all reference to the testimony of this expert witness as to the meaning of the call contained in the report of the Commissioners "from the Tennessee River to the main ridge," which testimony is as follows: "I understand that it means to go to the main ridge, directly to the main ridge as the closest place" (Record, p. 1433), and this is just what the Court of Appeals at Cincinnati construed said call to mean (103 Fed., p. 542).

Said abstract on page 83 misconstrues Williams' testimony in relation to State line trees on Hangover. He did not

say he never found any State line trees that he was satisfied were such, but rather that he did not find any marks that he thought were the originals; that the sourwood was so decayed he could not count the age (Rec., p. 1434).

And it is to be borne in mind that this sourwood had been blocked some fourteen years prior to Williams' testimony and the block taken into the Circuit Court of the United States at Knoxville in the case of Hebard *vs.* Belding.

On page 84, in referring to tree No. 30, Williams' testimony in relation to what was found by the blocking of said tree, as set out on pages 1441-1444 of the printed record, is omitted. And on page 85 of said abstract there is no reference to Williams' testimony that a good surveyor would have shown in his report or on his map the crossing or following of any stream in the course of his survey, which testimony is found on page 1458 of the printed record.

On page 85 of said abstract Williams is made to say that "the Slick Rock Creek is inaccurately located," when he only answered "yes" to the question: "If that stream marked 'Creek' on that map of 1821 is Slick Rock, you know, don't you, that it is inaccurately located?" Williams never stated that Slick Rock Creek is shown on the map of 1821.

Further on page 85 he is made to state that "no other stream than Slick Rock comes in there," when his answer on cross-examination was referring to streams west of the boundary line and the questions were predicated upon Burns' map and calling witness' attention to the locality half a mile below where the line crossed to go over Hangover.

Rec., p. 1460.

All reference to his testimony on page 1463 of the printed record, to the effect that Fodderstack Ridge does not keep up to its general average as well or better than Hangover, is omitted.

On page 85 of said abstract he is made to say that Cheoah is about at right angles to Slick Rock and at an angle of 60°

or 63° to Hangover, but he makes no such statement as to the actual location of Cheoah, and his answer is predicated upon what is shown by the Burns map, to which his attention was called in the question to elicit the answers referred to.

Rec., p. 1464.

On pages 85 and 86 we respectfully insist the abstract omits Williams' testimony in relation to his reasons for believing Hangover to be the main ridge, his testimony in relation thereto appearing on page 1465 of the printed record.

The abstract on page 86 omits Williams' detailed testimony of the marks on tree No. 30, as set out on page 1471 of the printed record.

On page 87 of the abstract, quoting from the printed record, page 1477, Williams is made to say: "If he was absolutely sure of State line marks on Slick Rock Creek, they would control him," when he made no such statement, and his testimony, to be properly understood, must be read in connection with the questions and answers which precede and follow the answer from which said statement on page 87 of the abstract was **misquoted.**

All reference to Williams' construction of the map of 1821 as sustaining the Tennessee contention in the Tellico territory is omitted. This testimony is found on pages 1485 and 1486 of the printed record.

All reference is omitted to his testiomny that, although he was looking for State line marks, he found no such tree as is described by Chambers west of tree No. 29 and between it and tree No. 30 (see Rec., p. 1487).

On page 91 of said abstract, apparently purporting to quote from page 1621, Williams is made to say: "I think that by very careful work **the** field-notes could be made from the map itself, which would make another map which would very closely resemble it." The article "the" is interpolated into Williams' answer to question 415; he did not say that

the field-notes—that is, the Davenport field-notes—could have been made from said map, but he expressly stated that it was not his opinion that the map of 1821 was made from the Davenport field-notes.

Rec., p. 1621.

O. L. Muller:

The abstract of the testimony of this witness does not fairly express much of the important testimony given by him. To illustrate: On page 92 there is a mere statement, referring to page 1370 of the record, that he found marked trees along the line on Hangover, and mentions the sourwood. This is not only true, but in view of complainant's reiterated statement that there was no evidence showing trees bearing State-line marks along Hangover, it would have been but fair to have made some reference, however slight, to Muller's description of the State-line marks found on three different trees along Hangover, and also his testimony describing the condition of these trees. This testimony was given in 1896—is positive and intelligent, carrying conviction with it.

On page 93 of the abstract Muller is made to state that "in his opinion the Unicoi is the highest ridge," when Muller was expressing his opinion that the mountain both north and south of Hangover is called the "Unicoi Range," and that this is the **highest range.** There can be no doubt about this.

Rec., pp. 1277-1278.

On page 93 of the abstract it is stated that Muller testified that the map shows that the line crossed "**at** a water-course," when he says nothing of the kind; his whole testimony contradicts the tenor of the questions being put to him and the positive statement made on page 93 of the abstract; what he did say was in substance that the map shows that the line crossed "**close**" to a water-course, and that it followed the

course of the mountain; that it crossed the Tennessee Rive when it struck it, and then run along Hangover Ridge an the main dividing ridge around and to the east of the head waters of Tellico River, and he reiterates his statement tha the line crossed the river directly from the fore-and-aft tre to the bank on the south side, which was very "steep an bluffy."

Rec., pp. 1281-1282, 1285, 1307.

J. K. Wilson:

The abstract of the important and material testimony James K. Wilson, found on page 94 of complainant's s called abstract, is a travesty and utterly worthless for an purpose. The clear, concise, and intelligent statement what this witness, who was examined in 1897, found in h survey of the State line along the Hangover Ridge, an especially his testimony in relation to the marked trees alon that line, are to be found on pages 1347, 1348, 1349, an 1350 of the printed record, and we submit to your hono that a mere reading of that testimony carries conviction th Wilson was right in his location of the line along Hangov Ridge. The judge of the Circuit Court believed him an the Court of Appeals at Cincinnati gave him credit.

H. M. Kent:

The abstract of the testimony of this witness, as fou on pages 94 and 95 complainant's abstract, cannot be all helpful to any court, because so much is omitted, but submit that while complainant was referring to the opini given by Mr. Kent he should have been accorded the just of having his opinion set out, as he did in his testimo found on page 1510 of the record, as follows:

> "That in coming to the hemlock my conclusion w it would follow the main ridge, and I considered t Hangover the main ridge, and it would go down th

way is my impression about it, and I must have reported that, but that is what I found and I reported what I found in the way of trees in detail."

We have thus shown that this so-called abstract and analysis of evidence cannot be relied on, because it sometimes misconstrues a statement, sometimes misstates the testimony, and sometimes puts in the mouth of the witness just the contrary of what he did say. Some of these misstatements, misconstructions, and interpolations we have pointed out; whether these were inadvertent errors, it is not material to inquire.

The result is the same—they show that the abstract cannot be relied upon and that the court must go to the record.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.
CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

FILED
OCT 15 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

STATE OF NORTH CAROLINA
vs.
STATE OF TENNESSEE

No. 4, Original
In Equity

BRIEF FILED IN BEHALF OF THEODORE COBB AND OTHERS, OWNERS AND HOLDERS OF THE STOCK IN THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

W. D. Spears
L. N. Spears,
Solicitors for Theodore Cobb, et al.

MACGOWAN-COOKE, CHATTANOOGA

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3. Issues defined showing that the language used in the Cession Act of 1876—"thence along the extreme heights of said mountain to a place called the Unicoi or Unaka Mountains." And the language used in the report made by the Commissioners to the respective legislatures of North Carolina and Tennessee, and the language used in the respective acts of the said Legislatures confirming the report of the said commissioners, viz: "thence to the mainR idge along the extreme heights, describing one and the same Ridge and line."..... 21-32

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6. The line insisted upon by Tennessee is a marked line and crosses the Tennessee River directly to the Hangover Lead and runs along the crest of that Lead, passing a marked tree along the line down to County Corners and thence around with the "Divide" to Jenks Knobs. 45-53

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7. The location of the line insisted upon by Tennessee is confirmed by the evidence of reputable citizens, detailing conversations had with older citizens and old surveyors now dead. ---------- 53-64

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The map of 1821—th is isthe map made by the Commissioners appointed by the State of North Carolina and by the Commissioners appointed by the State of Tennessee, and accompanying the report of the Commissioners. It confirms the location of the line as contended for by Tennessee. 63

A map which accompanies a grant, or, in this case, accompanied the report mad eto the Legislatures, has a locative effect.

Belle v. Hickman, 25 Tenn. (Humph.) 397.
M'Iver v. Walker, 9 Cranch., 173, L. Ed. 694.
43 C. C. A., 303.
Hebard v. Belding, 103 Fed. Rep. 532.

10. CONTENTION OF NORTH CAROLINA.

North Carolina invokes the principle that lines run and marked at the time of the original surveys, upon which a grant is issued, if found, constitutes the true boundary.

Cook v. Brunley, 11 Wallace, 659.
M'Iver v. Walker, 9 Cranch, 173.
Clement v. Parker, 125 U. S., 109. ---------- 84-85

But in order to make a marked line controlling, it must be identified.

Shenooweth v. Harper, 3 Peters, 92 L. Ed., 614.
Phagan v. Stoner, 67 Texas, 286.

Elliott v. Jefferson, 133 N. C., 207, reported in 64 L. R. A., 135.
Massingale v. Boiles, 4 Humph., (Tenn.) 205.
Martin v. Nance, 3 HeHad, (Tenn.) 205.
Staub v. Northcut, 9 Cates, 734. ---------- 86-88

The only marked line shown by the proof is the line up Slick Rock Creek. There is no marked line from the Spruce Pine along the north bank of the river, nor is there any marked line along the crest of the State Ridge or Jenks Ridge. -------- 84

11. North Carolina has wholly failed to identify the line run and marked by the surveyors in 1821 and adjudged by them as the line between the two States.

Belding v. Hebard, 43 C. C. A., 303, reported in Fed. Rep., 532.
Phagan v. Stoner, 67 Texas, 288.
Elliott v. Jefferson, 133 N. C., 207.
McIver v. Walker, 9 Cranch, 173. ---------- 93

12. DOCTRINE OF REASONABLE CONFORMITY. Reasonable conformity is another name for identification.

Williamson v. Buchanan, 2 Yea., 278.
Garner & Dickson v. Norris, 1 Yea., 67.
Houston v. Pillar, 1 Yea,. 402.
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Hunnicutt v. Peyton, 102 U. S., 2636, 26 L. Ed., 119.
Martin v. Fulgar, 15 Cal., 280.
Russell v. Hunnicutt, 70 Texas, 69.
Martin v. Hughes, 90 Texas, 632.
Elliott v. Pearl, 10 Peters, 412, 9 L. Ed., 475.-- 102

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Collins v. Clow, 222 Pa., 472, reported in 15 Am. & Eng. Anno. Cas., 871. ---------- 104

16. Davenport's Field Notes contradicted and destroyed by the map and report of Commissioners. ----

17. The line described in the Commissioners report and conformity acts of the two legislatures not ambiguous, and parol evidence is inadmissable to vary the language of the Cession Act, the written report or conformity acts of the Legislature.
Bishop v. Arnold, Tenn., 366.
Staub v. Hampton, 7 Cates, (Tenn.) 725.
Read v. Prop. Locks & Canals, 8 Howard U. S., 287, 12 L. Ed., 1077.
Boardman v. Reed & Ford, 6 Peters, 325, 8 L. Ed., 422.
Lowndes v. Hightower, 153 U. S., 191, 38 L. Ed. 619. ---------- ---
State v. Nashville, 2 Cooper Chancery Reports, 75.
Johnson v. Kellogg, 7 Heisk., 262. -------- 110-112

18. ESTOPPEL.
Hebard v. Belding, 43 C. C. A., 303, 103 Fed. Rep., 532.
Virginia v. Tennessee, 138 U. S., 503, 37 L. Ed. 537.
Bartlett Lumber Co. v. Saunders, 103 U. S., 316, 28 L. Ed., 549. ---------- 113

19. But, if the line as insisted upon by North Carolina had ben run and marked by the Commissioners as the State line, under the facts of this case, it would not be binding upon the State of Tennessee.
Schrader Mining & Mfg. Co. v. Packer, 129 U. S., 512, 32 L. Ed., 764.
Higuera's Heirs v. United States, 72 U. S., 827, 18 L. Ed., 471.
Ayer v. Watson, 113 U. S., 594, 28 L. Ed., 1097. ---------- 123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

STATE OF NORTH CAROLINA vs. STATE OF TENNESSEE	No. 4, Original In Equity

TO THE HONORABLE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

May it please the Court:

This brief is filed in the interest of Theodore Cobb and others, owners and holders of the stock in the Smoky Mountain Land, Lumber & Improvement Company.

Prior to 1895, Chas. Hebard claimed to own a tract of land situated in Munroe County, in the State of Tennessee, west of and adjacent to the land now in controversy in this suit (Record p. 1362.) Hebard claimed that David W. Belding and others were then setting up a claim to the land under grants issued by the State of North Carolina and were at that time trespassing upon same; filed a bill to restrain trespasses and remove defendant's claim as a cloud upon the title

to said tract of land. in the Chancery Court of Munroe County, Tennessee, and to have his title to said land set up and established.

The case was removed to the United States Court for the Northern Division of the Eastern District of Tennessee. While this case was pending in said Court, the plaintiff, Chas. Hebard, acquired by purchase from T. E. H. McCrosky and A. M. McCrosky, the land embraced in Grant No. 8970, issued by the State of Tennessee to them on May 14th, 1892, based upon an entry made in Munroe County, Tennessee, on July 28th, 1893, and embraces 5000 acres, more or less, described as:—

> "Lying in Munroe County, Tennessee, in the Ocoee District, beginning at the mouth of Slick Rock Creek where it empties into the Tennessee River, thence up Slick Rock Creek with the line of White and Bearden land to the point where said White and Bearden line leaves the creek, thence following the White and Bearden line to where it intersects the North Carolina line, thence to the river and down same to the beginning." (Record p. 1156.)

Thereupon the said Chas. Hebard filed a bill in equity in the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee against the D. W. Belding, Henry Stick, Nathan Stick, Louis Kron, D. W. Hyman, May Bragg, R. L. Cooper, J. W. Cooper, and R. M. Archer, alleging title to something like 40,000 acres of land by virtue of grant issued by the State of Tennessee and interme-

diate conveyances from the State of Tennessee to himself. This bill embraced all the land mentioned and described in the original bill in Munroe County, Tennessee, as well as the land acquired by Hebard from the two McCroskys, as above recited.

In this bill it was alleged that the defendants were trespassing on said land, were cutting and removing the timber therefrom and otherwise committing waste thereon and asked that this trespass be enjoined and that the claims of the defendant be removed as clouds from complainant's title.

The defendants, in their answer, claimed to own the land in controversy by virtue of grants issued by the State of North Carolina which had come to them by intermediate conveyances. The title to the land turned upon the location of the boundary line between the State of North Carolina and the State of Tennessee, and the object of the bill was incidentally to have the State line ascertained and determined between the Little Tennessee River and the Mountain Peak called Stratton Bald, a distance of seven or eight miles from where the State line crosses the Little Tennessee River, as it was evident that the title depended upon which State had power and jurisdiction to issue the grants. Hebard claimed the land was situated in the State of Tennessee, while the defendant insisted that it was situated in the State of North Carolina. Hence, to ascertain the title, it became necessary to locate the State line, as above stated. Now, the State of Tennessee contended that the line crossed the Tennessee River at a spruce pine situated on the north bank

of said river, to the bluff of the Hangover lead, ascending the lead to the crest, ran along the crest of the ridge to the point where the Fodderstack lead joins it, at a point known in the record as the "Junction" commonly called Stratton Bald.

On the other hand, the State of North Carolina insisted that when the line reached the Tennessee River at the spruce pine, which is conceded to be a fore and aft tree in the said line, situated on the north bank of the river, it turned to the Northwest and followed the north bank of the Tennessee River for something like a half a mile to a point opposite the mouth of Slick Rock Creek (a creek which rises back in the mountains and runs in a westerly direction to where it empties into the Tennessee River,) and then proceeds up the Slick Rock Creek opposite a spur of the Fodderstack, then up this spur to the crest of the Fodderstack, thence along the crest to a point called the "junction' or Stratton Bald.

There are 6,600 acres of land between these lines the title to which is in litigation in said case. That case was heard upon its merits by the Honorable C. D. Clarke, District Judge, who found the equities and merits of the case to be with plaintiff, Hebard; decreed that the proper location of the state line was as insisted upon by the State of Tennessee, gave plaintiff full relief, perpetually enjoining the defendants from committing waste, removing their claim under the North Carolina grants as a cloud on Hebard's title to the land. From this decree an appeal was taken to the United States Circuit Court of Appeals for the Sixth District at Cincinnati, and

the case was heard by that Court on March 14, 1900, wherein a decree was rendered, in which the decree of the Circuit Court was, in all things, confirmed. The opinion of the Circuit Court of Appeals was delivered by the late Judge Lurton and is reported in 103 Fed. Rep. 532.

After the final decree in the Circuit Court of Appeals was entered, the rights of all the parties determined, on August 6th, 1907, William R. Hopkins and others claimed that pending the litigation involving the title to said land that he and those associated with him had purchased and had conveyed to them and had succeeded to all the title, rights and equities of Belding and others to the land involved, alleged that they were very much aggrieved by the decree of the Circuit Court, and the affirmance thereof in the Court of Appeals, and asked leave to file a bill of Review and to have said decrees reviewed and reversed. This bill of review was based upon the allegation that since the determination of this case in the Circuit Court of Appeals, the petitioners in the bill of review had discovered a map which was made by the commissioners who ran the line between the State of North Carolina and the State of Tennessee in 1821, and that the said line as laid down upon this map was in exact accord with the contention of the State of North Carolina, that the line when it reached the river ran down the river for about a half a mile and then across the river at the mouth of Slick Rock Creek, thence ran up the creek to a spur of the Fodderstack, and thence around as claimed to the "junction" or Stratton Bald. This petition, accompanied with the pro-

posed bill of review, was presented to Judge Clarke of the District Court, who thereupon directed notice to be served upos the Smoky Mountain Lumber Company and others to show cause why it should not be filed. Such proceedings were had in this case, that Judge Clarke permitted the bill of review to be filed, subject to all legal objections, by demurrer, answer, plea, or otherwise.

The bill of review alleged the death of Chas. Hebard and made his heirs and assigns, the Smokey Mountain Lumber Company and others, the then owners of the land, defendants. Answers and replications were filed, and all the evidence filed. When the case was heard before the Honorable John E. McCall, District Judge, sitting in place of Judge Clarke, he entered a decree on July 5th, 1909, dismissing the bill of review. From this decree William R. Hopkins and others, plaintiffs in the bill of review, appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati where on October 11th, 1911, Knappen, Circuit Judge, delivered the opinion of the Court, in which he affirmed the decree of Judge McCall in all respects, dismissing the bill of review. In the opinion delivered by Judge Knappen, he set out in full the opinion of Judge McCall, and the case is reported in 194 Fed. Rep. 301.

In the meanwhile, the State of North Carolina brought this original suit in this Court against the State of Tennessee, to have that part of the boundary lines between the two states located and settled, beginning at a point a short distance north of the Tennessee River, thence in a south-

west direction to the place called Unaka or Unicoi Mountains. After this suit was brought, W. R. Hopkins and others instituted proceedings, and brought the suit of Hopkins and others against Belding and others to this court where the same is now pending.

On or about April 24th, 1909, the Babcock Lumber and Land Company filed a petition in this court, in this case (North Carolina against Tennessee) setting forth the facts substantially as above recited, and alleged that the line claimed to be in dispute between the State of North Carolina and the State of Tennessee is the same identical line settled and established in the suit of Chas. Hebard against David W. Belding and others, in the Circuit Court of Appeals for the Sixth Circuit, on July 13th, 1900; and further alleging that the petitioners, that is the Babcock Lumber and Land Company, were the present owners of the land in dispute between the State of North Carolina and the State of Tennessee, that they purchased said land after the decree was entered in the Circuit Court of Appeals, that they were vitally interested in the outcome of this suit because if the decree in this case should be different from the decree of the United States Circuit Court of Appeals, it would put a cloud upon their title, if not seriously affect and destroy it. This seems to be the effect of the holding in the case of State of Iowa against the State of Illinois, 151 U. S., 237; 38 L. Ed. 143, where it is held that in the determination of the boundary lines between sovereign states this court proceeds only upon the utmost circumspection and deliberation and no order can

stand in respect to which full opportunity to be heard has not been afforded, and where the report of the Commissioners to fix the boundary lines between the States has been as to a portion of the boundary confirmed by this court, the order of confirmation will be vacated if it was made without notice to one of the states, etc. Evidently, the court had in mind this holding, when on May 11th, 1909, it entered the following order:

> "On consideration of the motion of the Babcock Lumber and Land Company for leave to intervene herein, it is now and here ordered by the Court that said motion be and the same is hereby denied; but leave is hereby granted to the Counsel for said company to file printed briefs herein as *amicus curiae*."

The Babcock Lumber & Land Company purchased the land in the Slick Rock Basin east of the Fodderstack and west of the Hangover Range, it being the land involved in this case, from the Smoky Mountain Land, Lumber & Improvement Company, in this way:

On the 29th of December, 1906, E. B. Babcocks contracted to purchase this property and other property comprising 42,000 acres of land from the Smoky Mountain Land, Lumber & Improvement Company. The consideration was $900,000,00. Twenty-five Thousand Dollars was paid in cash at the time, and $575,000.00 has since been paid, leaving a balance of $300,000.-00 still unpaid to the Smoky Mountain Land, Lumber & Improvement Company.

In the contract with Babcock, the suit of Hebard against Belding and others is referred to, and it was conceded that that suit cast a cloud upon the title to that part of the propery mentioned in the contract between Fodderstack range on the west and the Hangover Range on the east, and situated in Slick Rock Basin, estimated to contain something like 10,000 acres.

It was also recognized in that contract that there might be some other small portions of the land mentioned in the contract covered by other titles. It was then further agreed that any part of the land that might be lost by reason of superior title, should be valued at the rate of $35.00 per acre, and the sum deducted from the $300,000.00, and only the balance of the $300,000.00 should be paid by Babcock to the Smoky Mountain Land, Lumber & Improvement Company.

Babcock, after this contract was made, or at the time it was made, assigned it to the Babcock Lumber & Land Company, and now this last company claims to be the equitable owner of this property.

From a recitation of these facts, it is apparent that the Smoky Mountain Land, Lumber & Improvement Company, one of the defendants to the bill of review hereinbefore mentioned, is vitally interested in this litigation.

William Cobb, Theodore Cobb and others are the directors and stockholders of the Smoky Mountain Land, Lumber & Improvement Company, and this brief is filed on behalf of said company and said stockholders.

PLEADINGS

The original bill in this case was filed in this Court by the State of North Carolina against the State of Tennessee, which, after setting forth the authority for the bringing of the suit, alleged that the boundary between the State of North Carolina and the State of Tennessee is disputed and in controversy insofar as the same is hereinafter set out; and that the State of Tennessee has lately been making grants of the land within the disputed territory and exercising sovereignty and jurisdiction thereover and interferring with the sovereignty of the State of North Carolina; and that the State of North Carolina had undisputed exercise of this sovereignty and jurisdiction over the land in said disputed territory, which sovereignty and jurisdiction of the said State of North Carolina was up to the year 1892, exercised without let, hindrance or controversy.

The bill then set out in detail the facts relating to the cession of the land by the State of North Carolina west of the Allegheny Mountain to the Government of the United States. This territory so ceded was organized into a state, now the State of Tennessee, and admitted into the Union as one of the United States of America.

That joint commissions were appointed by the two states in 1796 to run and mark the lines separating the State of Tennessee from the State of North Carolina according to this cession act. That these commissioners marked and settled the line from the northeast, or the Virginia line, to a point on the Great Smokey Mountains west

of Pigeon River, marked by a stone set up on the north side of Cattalouchee Turnpike road; but for some reason the line was not run and marked between the Cattalouchee Turnpike road and the Georgia line.

That afterwards, about 1819, the general assembly of the State of North Carolina passed an act which is set out in full in the bill, the object of which was stated to be "to accurately run, distinctly mark and permanently establish the boundary line between the State of North Carolina and the State of Tennessee from the point where the former commissioners stopped to the western terminus."

That about the same time the State of Tennessee passed a similar act and appointed commissioners, "to accurately run and distinctly mark and permanently establish this boundary line between the two states from the Cattalouchee Turnpike road to the Georgia line."

That said commissioners met, jointly ran and marked the line, and that they made written reports to their respective states, which reports were, by the respective general assemblies of said states, adopted and confirmed in 1821; and that ever since the States of North Carolina and Tennessee have exercised jurisdiction and sovereignty in all respects, have made surveys and issued grants to land in accordance with the said line as located by said commissioners, and have recognized the said line as the true line.

The bill then alleges that the boundary line between the State of North Carolina and the State of Tennessee may be generally described as following the main ridge or watershed of the

Allegheny Mountain Range, which has many local names, such as Great Iron and Smoky Mountains, and the Unaka or Unicoi Mountain; that between the extreme heights of the Great Iron or Smoky Mountains and the main ridge of the Unaka or Unicoi Mountains, the Tennessee River breaks through the mountains in a northwest course and a part of the said line which extends over the extreme height of the Great Smoky Mountains of the Tennessee River, crossing the river ascends to the main ridge of the Unaka or Unicoi Mountains, has fallen into dispute.

The bill then states that the line between these points descends from the extreme height of the Mountains northwestwardly to the river, crosses the river at a point on the southwest bank thereof, thence west to the mouth of a stream known as Slick Rock Creek, follows the creek about five miles to a lead leading up the main ridge, follows said ridge up to the summit of what is known as the Big Fodderstack Mountain, and then follows the main ridge to the junction of the Big Fodderstack and then follows the main ridge to the Unaka Mountains southwestwardly.

The bill then states that up to the year 1892, the line as above described, was admitted to be the true line; that the State of Tennessee recognized this line in the year 1835, when it laid out the Ocoee District, and fixed this line as the eastern boundary of said district, and of its County of Munroe.

That after the removal of the Cherokee Indians from this territory, the State of North Carolina, in the year 1853, opened these lands to its citizens for Entry, and thereafter issued a large number of grants running to said line

as the State line, collecting taxes on all of the lands up to said line.

That in the year 1892, the State of Tennessee granted the land to T. E. H. and H. M. McCroskey, lying between the line as claimed by North Corolina and the line as claimed by the State of Tennessee.

That controversies have arisen over the title to this land by parties claiming under the grants issued by the State of North Carolina, (referring of course, to the suit of Hebard against Belding and others) and the State of Tennessee,

That diligent and earnest searches were made both at Nashville, Tennessee, and at Raleigh, North Carolina, for the field notes, maps and reports of said commissioners, but could not be found until about the year 1903, when the reports and maps of the commissioners were found at Nashville, Tennessee, and that said reports and maps show said line to be where the State of North Carolina has always claimed it to be; but that the State of Tennessee refuses to recognize said line and is now claiming the true line to be eastwardly of said line, taking a part of the territory of the State of North Carolina, about three miles wide, and about ten miles long. The prayer of the bill is for a decree locating the lines in accordance with the contention of North Carolina. (Record pp. 2 to 8.)

On the 9th day of June, 1909, the State of North Carolina filed an amended bill making substantially the same allegations as it made in the original bill. The only material difference between the original and amended bills, the amended bill extends and lengthens that part of

ence or discrepancy in distance does not materially
against defendant, especially in view of the fact
evidence shows (McNab, pp. 1522, 1523) that al
undisputed line between the Meigs line, which cr
boundary between the States at 31-½ miles and t
mile tree there is a discrepancy of a little more tha
miles—that is, that the distance actually measur
over the distance called for by the plat a little m
three miles in eighteen and a half miles.

So we submit that Tennessee's contention, confor
the imperishable locative calls of the Cession Act,
be defeated by such a mere discrepancy in distance

It is singular what curious results may be sh
figures.

The discrepancy in distance above noted on t
nessee contention arises in that portion of the line
around the headwaters of Tellico along the main
ridge, and if that phase of the controversy were el
the distance from the 59th-mile tree along the T
contention by way of the marked hemlock and R
Ridge, and thence along the undisputed State line
Hangover and the State Ridge, and thence follow
North Carolina contention, instead of around th
waters of the Tellico, to the 101st-mile tree, at Una
pike, would measure within 700 feet of exactly 42
to be explicit, the distance would be 41.87 miles,
.13 of a mile less than the 42 miles supposed to
for by said map.

However, Tennessee stands on this record for b
tentions, and she is not to be dragged away from t
calls of the Cession Act by a discrepancy in distanc
or four miles in a line 42 miles long, especially w
uncontroverted proof shows that where the bound
is not in dispute the map in the matter of distan
grossly inaccurate.

The Present North Carolina Contention is Invalid Because it Has Never Received the Sanction or Consent of Congress.

By her Cession Act of 1789 North Carolina ceded to the United States all of her territory west of a line along the extreme height and highest ridge of the Great Iron or Smoky Mountain to the place where it is called Unicoy or Unaka Mountain, and the territory so ceded was accepted by the United States and thereafter erected into the State of Tennessee—thus guaranteeing to defendant State of Tennessee that same line as her eastern boundary.

The evidence in this cause establishes as a fact—indeed, it is practically admitted by every witness for North Carolina save only D. B. Burns, that the present North Carolina contention, both at Slick Rock and Tellico, is a **material departure** from said Cession Act and the act of Congress accepting the ceded territory.

Our proposition is that even if the Commissioners in 1821 ran and intended to adopt the present North Carolina contention both at Slick Rock and Tellico, that such new line sought to be adopted by said Commissioners, away from and not in conformity with the description of the boundary as called for in the Cession Act, never having received the consent or sanction of the Congress of the United States, is invalid and in conflict with article 1, section 10, clause 3 of the Federal Constitution, providing that "No State shall, without the consent of Congress, * * * enter into any agreement or contract with another State," etc.

We are not unmindful of the holding of this court in Virginia *vs.* Tennessee, 148 U. S., 503, that the consent of Congress may be given after as well as before the compact, and may be inferred from other acts of Congress relating to judicial divisions and administrative or revenue districts, and that it is a principle of public law universally recognized, that independently of any effect due to the compact as such,

a boundary line between States, as between private persons, which has been not only run out and marked upon the earth, but afterwards recognized and acquiesced in by the parties for a long course of years, will be treated as conclusive, even though it varies somewhat from the call or description of the original grant. But we respectfully insist:

(1) That the Congress has never consented to the adoption of a new line departing from the calls of the Cession Act in any way whatsoever, and the facts in this case are materially different from those found in the case of Virginia *vs.* Tennessee, where Federal districts and revenue and administrative divisions, as enacted by the Congress, recognized the particular line which had been run, marked and recognized by both States.

(2) No such acquiescence by Tennessee in the present contention of North Carolina is shown in this case as was established in Virginia *vs.* Tennessee.

On the contrary, both parties have exercised acts of dominion within the disputed territory by the issuance of grants, by the levy of taxes, and, on the part of Tennessee, by judicial sale of the land for taxes, and by the running of process from her courts into the disputed territory, and by permitting residents within the disputed territory to vote in her elections.

The mandate of the Constitution is plain, and that the consent of Congress is necessary to give validity to any compact between States affecting their boundary, and particularly to one altering their boundary, as recognized by this court in—

Virginia *vs.* Tennessee, 148 U. S., 525.

It does not strengthen North Carolina's case that this departure from the true boundary, as defined in the Cession Act, was attempted to be confirmed by acts of the General Assembly of both States, because neither the line nor the

report in relation thereto, nor said confirmatory acts, have in any way expressly or impliedly been recognized, consented to or sanctioned by the Congress of the United States.

Moreover, the equity of the case is for North Carolina to stop at the boundary fixed by her Cession Act.

Further, **there is nothing in either of the confirmatory acts to indicate that the line described in the Cession Act had been departed from** and a **new line established.**

In fact the Commissioners reported that they ran and so reported the line "**as designated**" in the Cession Act (Rec., p. 51) and the North Carolina confirmatory act of 1821 adopting that report recited that the boundary line had been run **agreeably to the calls of said Cession Act** and in conformity to the instructions given said Commissioners.

Appendix, pp. 11-12.

Conclusion.

The record in this case may be summed up as follows:

1. The Cession Act of 1789 fixes the boundary line at and along the extreme height of the main mountain between the points in controversy.

Appendix, pp. 5, 6.

2. The Commissioners appointed in 1821 were directed by the acts of both States to run the line "agreeably to the true intent and meaning" of said Cession Act.

Appendix, pp. 10, 13.

3. The Commissioners of both States reported that they had run "the said dividing line as designated" in said Cession Act and the first constitution of Tennessee.

Rec., p. 11.

4. The North Carolina confirmatory act of 1821 recites in its preamble that the line was run agreeably to the Cession

Act, and describes that part of the line in controversy as it is described in the report of the Commissioners, to wit, "from Tennessee River to the main ridge and along the extreme height of the same to where it is called Unicoy or Unaka Mountain."

Appendix, p. 16.

5. The evidence establishes that the calls of the Cession Act, the report of the Commissioners, and the confirmatory acts of both States, if followed, would locate the boundary line on and along the Hangover Ridge and the main dividing ridge around and to the east of the headwaters of the Tellico River, in accordance with the contention of Tennessee.

6. The Commissioners did run and mark a line on Hangover, and while a tentative line was probably run up Slick Rock Creek, such line was a departure from the calls of the Cession Act and not adopted by the Commissioners in their report and map or by said confirmatory acts.

7. That while the Commissioners were misled into running down the so-called State Ridge and may have crossed the Tellico River, upon discovery of their mistake and departure from the calls of the Cession Act, they adopted and reported the boundary line, as designated in said Cession Act, on the main ridge and the extreme height thereof, which did not cross but ran around and to the east of Tellico River on the extreme height of the mountain, as described in their report and the map accompanying the same.

8. As to acts of dominion or sovereignty over the disputed territory, the record shows in brief:

(*a*) Between 1821 and 1836 the disputed territory was a part of the land occupied by the Cherokee Indians, who, in 1836, ceded their land to the Federal Government, the Cherokee lands on the North Carolina side being subsequently ceded to North Carolina and those within Tennessee to her.

(*b*) In 1836 Tennessee caused her part of the Cherokee

lands—that is, said lands west of the boundary line between the States—to be laid off into a land district called the "Ocoee District." The Surveyor General of said district omitted to include the lands between the marked line on Hangover and the one on Slick Rock in his plat or survey and bounded said survey by Slick Rock Creek, but placed nothing on the plat thereof to indicate that it was the boundary line between the States (Rec., p. 8); he surveyed and sectionized the disputed territory at Tellico—that is, the lands east of the so-called State Ridge up to the main ridge—and the plat thereof indicates that **eastward** of said **sectionized** lands is the boundary line between the States.

Rec., p. 1158.

(*c*) In 1836 North Carolina surveyed out her part of said Cherokee lands eastward of the boundary line, preparatory to erecting said territory into Cherokee County, and caused a map of said territory to be made showing the boundary line between the States to be on an unbroken mountain and watershed all the way from the south bank of the Tennessee River around and to the east of the headwaters of Tellico River to the point at the Unaka turnpike where said line turns southward toward Georgia.

Rec., p. 1176.

(*d*) That the territory in dispute is wild and in many places almost impenetrable, valuable even now only for its timber, and probably uninhabited by white men prior to 1860.

(*e*) That beginning in 1842 Tennessee issued grants covering the disputed territory around the headwaters of Tellico River.

(*f*) That beginning in 1853 or 1854 North Carolina permitted entries or issued grants west of Hangover and not limited to Slick Rock Creek as the boundary line, but extending west and north of Slick Rock Creek to and beyond the

top of Little Fodderstack Ridge, thus covering the entire basin and watershed draining into said creek.

(*g*) In 1854 Tennessee passed an act authorizing entries and grants of any vacant lands in said Ocoee District, whether or not the same had been designated on the map of said district, hereinbefore referred to (Appendix, pp. 25-6), and under this act about 1,883 entries were made by and grants issued by Tennessee to McCroskey and to Morton and Griffiths which called for the line along Hangover Ridge as the boundary line between the States.

(*h*) Tennessee, by her act of 1845, creating the county of Jones, included the disputed territory within the boundaries of said county.

(*i*) Both parties have collected taxes off of the claimants of the lands in dispute, **and though neither State has acquiesced in the claims of the other,** Tennessee, in addition to the acts of dominion above stated, has sold said lands for taxes and caused the process of her courts to run into said disputed territory and permitted the residents thereof to vote in her elections.

Therefore, in conclusion, we respectfully submit that:

1. The Tennessee contention, being in accord with the North Carolina Cession Act, the act of Congress accepting the ceded territory, the Constitution of Tennessee, the report and map of the Commissioners of 1821, and the confirmatory acts of both States, should be established by decree of this court as the true boundary line between the States.

2. Even if it should appear that the Commissioners in 1821 ran and intended to adopt the present North Carolina contention either at Slick Rock or Tellico River, the line represented thereby is a manifest departure from said Cession Act and is a new line not warranted either by said acts or the acts giving instruction to and fixing the duties of said Commissioners, and that, neither said line nor any attempted compact in relation thereto having received the consent or sanction of Congress in any way whatsoever, the same are

invalid, and the decree should be to establish the boundary line as fixed and located by the Cession Act of 1789, upon and along the Hangover Ridge and Mountain and with the extreme height of the mountain around and to the east of the Tellico River.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.

CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

STATE OF NORTH CAROLINA, Complainant,

vs.

STATE OF TENNESSEE, Defendant.

APPENDIX TO DEFENDANT'S BRIEF,

Showing Statutes and Parts of Statutes of North Carolina, Tennessee, and the United States Bearing on the Questions Involved in the Above-entitled Cause.

FRANK M. THOMPSON,
Attorney General of Tennessee.

SAMUEL G. SHIELDS,
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Solicitors for Defendant.

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North Carolina Cession Act of 1789 *as Found in the Revised Statutes of North Carolina by Battle, pp.* 172, 173.

"An Act for the Purpose of Ceding to the United States of America Certain Western Lands Therein Described.

"(Passed at the Session of 1789.)

"Whereas the United States in Congress assembled have repeatedly and earnestly recommended to the respective States in the Union claiming or owning vacant western territory, to make cessions of part of the same, as a further

means, as well of hastening the extinguishment of the debts, as of establishing the harmony of the United States; and the inhabitants of said western territory being also desirous that such cession should be made, in order to obtain a more ample protection than they have heretofore received: Now this State being ever desirous of doing ample justice to the public creditors, as well as the establishing the harmony of the United States and complying with the reasonable desires of her citizens:

"1. *Be it enacted, &c.,* That the Senators of this State in the Congress of the United States, or one of the Senators and any two of the Representatives of this State in the Congress of the United States, are hereby authorized, empowered and required to execute a deed or deeds on the part and behalf of this State, conveying to the United States of America all right, title and claim which this State has to the sovereignty and territory of the lands situate within the chartered limits of this State, west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain, to the place where Watauga River breaks through it, thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same, thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain, from thence along the extreme height of said mountain to where Nolichucky River runs through the same, thence to the top of Bald Mountain, thence along the extreme height of the said mountain to the Painted Rock, on French Broad River, thence along the highest ridge of said mountain, *to the place where it is called the Great Iron or Smoky Mountain, thence along the extreme height of said mountain, to the place where it is called Unicoy* or Unaka Mountain, between the Indian towns of Cowee and Old Chota, thence along the main ridge of the said mountain, to the southern boundary of this State." (Italics in this appendix are ours.)

Cession Accepted by United States.

The cession by North Carolina of the territory described in said cession act was accepted by the United States by act of Congress passed April 2, 1790, entitled "An act to accept the cession of the claims of the State of North Carolina to a certain district of western territory," found in United States Statutes at Large, vol. 1, pp. 106-109, inclusive.

Description of the Eastern Boundary of Tennessee, as Shown in Our Own Constitution of 1796 (*Declaration of Rights*), *Article XI, Section XXXII.*

"XXXII. That the limits and boundaries of this State be ascertained, it is declared that they are as hereafter mentioned; that is to say: Beginning on the extreme height of the Stone Mountain, at the place where the line of Virginia intersects it, in latitude thirty-six degrees and thirty minutes north; running thence along the extreme height of the said mountain to the place where Watauga River breaks through it; thence a direct course to the top of Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain between the waters of Doe River and the waters of Rock Creek to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to the place where Nolichucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of said mountain to the Painted Rock, on French Broad River; thence along the highest ridge of said mountain, *to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain* to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this State, as described in the act of cession of North Carolina, to the United

States of America; and that all the territory, lands and waters lying west of the said line, as before mentioned, and contained within the chartered limits of the State of North Carolina, are within the boundaries and limits of this State, over which the people have the right of exercising sovereignty and right of soil so far as is consistent with the Constitution of the United States, recognizing the Articles of Confederation, the Bill of Rights and Constitution of North Carolina, the cession act of the said State, and the ordinance of the late congress for the government of the territory northwest of the Ohio; provided nothing herein contained shall extend to affect the claim or claims of individuals, to any part of the soil which is rocognized to them by the aforesaid cession act."

Scott's Laws of Tennessee, vol. 1, pp. 538, 539.

Act of Congress Admitting Tennessee Into the Union.

"An Act for the Admission of the State of Tennessee into the Union.

"Whereas by the acceptance of the deed of cession of the State of North Carolina, Congress are bound to lay out into one or more States, the territory thereby ceded to the United States:

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the whole of the territory ceded to the United States by the State of North Carolina, shall be one State, and the same is hereby declared to be one of the United States of America, on an equal footing with the original States, in all respects whatever, by the name and title of the State of Tennessee. That until the next general census, the said State of Tennessee shall be entitled to one representative in the House of Representatives of the United States; and in all oher respects,

as far as they may be applicable, the laws of the United States shall extend to, and have force in the State of Tennessee, in the same manner, as if that State had originally been one of the United States.

"JONATHAN DAYTON,
"Speaker of the House of Representatives.
"SAMUEL LIVERMORE,
"President of the Senate pro tempore.

"Approved, June the first, 1796:
"GEORGE WASHINGTON,
"President of the United States."

Act of North Carolina, Passed in 1796, *Providing for Settling the Boundary Line Between That State and Tennessee, as Shown in Battle's Revised Statutes of North Carolina, pp.* 93, 94.

"An Act for Appointing Commissioners to Settle the Boundary Line Between This State and the State of Tennessee.

(Passed in the Year 1796.)

"Whereas it is necessary to prevent disputes between this State and its citizens, that the boundary line between this State and the State of Tennessee should be accurately and distinctly marked out and permanently established:

"1. *Be it therefore enacted, &c.,* That Joseph M'Dowell, Mussendine Matthews, and David Vance be, and they are hereby appointed commissioners, to meet the commissioners who are or may be hereafter appointed by the State of Tennessee, at such time and place as shall by the said commissioners, or a majority of them, be agreed on; and with them to settle all and every difference, controversy, dispute, and

claim that may subsist or arise between this State and the State of Tennessee with respect to the boundaries; and to fix and permanently establish the boundary line between the two States, and the same to mark and ascertain, as distinctly as possible, *agreeably to the true intent and meaning of said boundary between this State and the State of Tennessee*, as described in an Act, entitled, 'An act for the purpose of ceding to the United States of America certain western lands therein described.' And the commissioners on the part of this State shall cause an accurate plat or plan of the said boundary line to be made, specifying the courses, distances, natural and artificial marks, and return the same to the next General Assembly, to be preserved among the archives of the State. *Provided, nevertheless,* That the ascertainment of said line shall not affect the titles of any person to lands entered in either of said States. And this State will at all times hereafter ratify and confirm all and whatever the said commissioners, or a majority of them, shall do in and touching the premises, and the same shall be binding on this State."

North Carolina Act Passed in 1819, *Making Provision for Running Boundary Line Between the States, as Shown in Battle's Revised Statutes of North Carolina, pp.* 94-95.

"An Act Making Provision for Running the Boundary Line Between This State and the State of Tennessee.

(Passed in the Year 1819.

"Whereas it is essential to the interest of this State in the disposal of the lands lately acquired by the treaty from the Indians, and to the continuance of the good understanding now happily subsisting between this State and the State of Tennessee, that the boundary line between the two States should be accurately run, distinctly marked, and permanently established:

"1. *Be it enacted, &c.*, That the governor shall, and he is hereby authorized to appoint three commissioners to meet the commissioners who may be appointed by the State of Tennessee, at such time and place as may by the said commissioners, or by a majority of those representing the respective States, be agreed on, and with them *to settle, run, and mark the boundary line between this State and the State of Tennessee, agreeably to the true intent and meaning* of the Act of the General Assembly of this State, entitled, 'An act for the purpose of ceding to the United States of America certain western lands therein described.'

"2. *Be it further enacted*, That the governor, as soon as may be after the passing of this act, shall give notice thereof to the governor of the State of Tennessee, and shall request the appointment of commissioners on the part of the said State, to act with those appointed by this State in ascertaining, running and marking the boundary line between the two States; and this State will at all times hereafter, ratify and confirm all and whatsoever the said commissioners, or a majority of those of each State shall do, in and touching the premises, and the same shall be binding on this State.

"3. *Be it further enacted*, That if it shall so happen that commissioners shall not be appointed by the State of Tennessee, to act with the commissioners of this State in amicably ascertaining and marking the boundary line between the States; or if it shall happen that the commissioners appointed by the State of Tennessee shall refuse to act with the commissioners on the part of this State, the commissioners on the part of this State are hereby authorized and required to proceed in running and marking said line from the Smoky Mountain, where the line terminated which was run the year one thousand seven hundred and ninety-nine, under the direction of Joseph M'Dowell, Mussendine Matthews, and David Vance, commissioners appointed by the Act of the General Assembly of this State, passed in the year one thousand seven hundred and ninety-six, for running and marking said line to the thirty-fifth degree of north latitude, ac-

cording to the courses designated in the act of seventeen hundred and eighty-nine, entitled 'An act for the purpose of ceding to the United States of America, certain western lands therein described.' And the commissioners on the part of this State shall cause an accurate plan of said boundary line to be made, specifying the courses, distances, natural and artificial marks thereof, and return the same to the General Assembly of this State."

The remainder of the act does not affect the question in controversy.

Tennessee Act appointing Commissioners, being chapter 22 of the acts of 1820, *entitled—*

"An Act to Provide for the Appointment of Commissioners on the part of this State, to co-operate with the Commissioners appointed by the General Assembly of the State of North Carolina, to run and mark the boundary line between this State and the said State of North Carolina.

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Governor shall be, and he is hereby authorized, to appoint three Commissioners, to meet the Commissioners who have been or may be appointed by the State of North Carolina, at such time and place, as may by the said Commissioners, or by a majority of those representing the respective States be agreed on, and with them to settle, run and remark the boundary line between this State and the State of North Carolina, *agreeably to the true intent and meaning of the said Act of* the General Assembly of the State of *North Carolina*, entitled 'An act for the purpose of ceding to the United States of America, certain western lands therein described,' *commonly called the 'cession act.'*

"SEC. 2. *Be it enacted*, That the Governor, as soon as may be, after he shall have appointed the Commissioners contemplated by this act, shall give notice thereof to the Gover-

nor of the State of North Carolina of the passage of this act, together with the persons by him appointed to act with the commissioners of that State.

"SEC. 3. *Be it enacted*, That whatsoever the said Commissioners, or a majority of those of each State, shall do in and touching the premises, shall be binding on this State.

"SEC. 4. *Be it enacted*, That in case of the death, refusal to act, or resignation of any of the Commissioners hereby appointed, the Governor is hereby authorized and required, as speedily as may be, to appoint other Commissioners or Commissioner in the place of such as may have died, resigned, or refused to act.

"SEC. 5. *Be it enacted*, That the Commissioners appointed under this act by the Governor, under the authority thereof, shall be allowed for their personal services, the sum of five dollars per day, and the said Commissioners, or a majority of them, are hereby authorized to employ such surveyor or surveyors, and such chain bearers and markers as they, or a majority of them, shall deem necessary. Each surveyor so appointed shall be allowed five dollars per day; each chain carrier and marker shall be allowed two dollars and fifty cents per day; said commissioners, surveyors, chain-bearers, and markers bearing their own expense.

"SEC. 6. *Be it enacted*, That to enable said Commissioners to make advances to the persons employed by them during the progress of said running, and to compensate them at the close thereof, the Governor, by his warrant, shall direct the Treasurer to pay said Commissioners, upon their notifying him, that they are ready to proceed to the discharge of the trust hereby reposed in them, the sum of five hundred dollars, and said commissioners shall account for their application of said money to the succeeding General Assembly.

"JAMES FENTRESS,
"Speaker of the House of Representatives.
"R. WEAKLEY,
"Speaker of the Senate.

"July 23rd, 1820."

(Acts of 1820, pp. 30-11.)

Tennessee Act passed in 1821, *confirming report of Boundary Line Commissioners* (*acts of* 1821, *chapter* 35), *entitled*—

"An Act to Establish the Boundary Line Between This State and the State of North Carolina.

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the dividing line run and marked by Alexander Smith, Isaac Allen, and Simeon Perry, commissioners, for and on behalf of this State, and James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the State of North Carolina, which dividing line as run by said commissioners, begins at a stone set up on the north side of Cataloochee Turnpike Road, and marked on the west side, Ten. 1821, and on the east side N. C. 1821; running thence on a southwestwardly course to the Bald Rock, *on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River* about seven miles above the old Indian town of Tallassee, crossing Porter's Gap, at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles, and crossing Tennessee River at the distance of sixty-five miles from the beginning; *from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain*, striking the old trading path leading from the Valley towns to the Overhills towns, near the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning, thence along the *extreme height* of the Unicoy or Unaka Mountain to the southwest end thereof, at the Unicoy or Unaka Turnpike Road, where a cornerstone is set up marked Ten. on the west side and N. C. on the east side, and where a hickory tree is also marked on the south side Ten. 101 M. and on the

north side N. C. 101 M. being one hundred and one miles from the beginning; from thence a due course south two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, *below the mouth of Cane Creek;* thence up the said river the same course, about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the State of Tennessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. where was set up by said commissioners a square post marked on the west side Ten. 1821, and on the east side N. C. 1821, and on the south side G. be and the same is hereby ratified, confirmed, and established as the true boundary line between this State and the State of North Carolina.

"SEC. 2. *Be it enacted,* That this act shall take effect and be in force so soon as the General Assembly of the State of North Carolina shall pass an act ratifying and confirming the line aforesaid to be the true boundary line between that State and the State of Tennessee.

"JAMES FENTRESS,
"Speaker of the House of Representatives.
"S. BREWER,
"Speaker of the Senate.

"Nov. 9th, 1821."

(Acts of 1821, pp. 46-47.)

North Carolina Act Confirming Report of Boundary Line Commissioners, as Shown in Battle's Revised Statutes of North Carolina, Vol. 2, pp. 96, 97.

"An Act to Confirm the Boundary Line Between This State and the State of Tennessee, and for Other Purposes.

(Passed in the Year 1821.)

"1. Whereas the States of Tennessee and North Carolina, by their respective commissioners, duly authorized for that purpose, have run and marked the boundary line between the said States, in conformity with their several instructions, and being legally authorized by the States to which they respectively belong; beginning where M'Dowell, Vance, and Matthews terminated their line between the two States in the year one thousand seven hundred and ninety-nine, and agreeably to the Act of the General Assembly, entitled 'An act for the purpose of ceding to the United States of America certain western lands therein described,' passed in one thousand seven hundred and eighty-nine; and in the eleventh article, called the Declaration of Rights, of the constitution of the State of Tennessee; which said dividing line, as run by the respective commissioners, beginning at a stone set up on the north side of the Catalouche Turnpike road, and marked on the east side N. C. one thousand eight hundred and twenty-one, and on the west side Ten. one thousand eight hundred and twenty-one; running thence a southwardly course to the Bald Rock, *on the summit of the Great Iron or Smoky Mountain, and continuing southwestwardly on the extreme height thereof to where it strikes Tennessee River*, about seven miles above the old Indian town Tellassee, crossing Porter's Gap at the distance of twenty-two miles from the beginning, passing Meigs' boundary line at thirty-one and a half miles, the Equinottey Path at fifty-three miles, and crossing Tennessee River at the distance of

sixty-five miles from the beginning, *from Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unacay or Unaka Mountain*, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning; thence along the extreme height of the Unacay or Unaka Mountain to the southwest end thereof at the Unacay or Unaka Turnpike road, where a cornerstone is set up, marked N. C. on the east side, and Ten. on the west side, and where a hickory tree is also marked on the north side N. C. 101 M. and the south side Ten. 101 M. being one hundred and one miles from the beginning; from thence a due course south, two miles and two hundred and fifty-two poles, to a spruce pine on the north bank of Highwassee River, below the mouth of Cane Creek; thence up the said river the same course about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the southern boundary line of the States of North Carolina and Tennessee, making in all one hundred and sixteen miles and two hundred and twenty poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. to a square on the east side N. C. 1821, on the west side Ten. 1821, and on the south side G. The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile; which line was run under the joint superintendence of commissioners appointed by the States of North Carolina and Tennessee, and a surveyor on the part of the commissioners of each State aforesaid.

"2. *Be it enacted, &c.*, That said boundary line, as described in the foregoing preamble, be, and the same is hereby fully established, ratified, and confirmed as the boundary line between the States of North Carolina and Tennessee forever."

North Carolina Act Passed January 20, 1837.

Acts of 1836-7, Chapter 9, Providing for Surveying, &c., the Lands Lately Acquired by Treaty with the Cherokee Indians.

"An Act Prescribing the Mode of Surveying and Selling the Lands of This State, Lately Acquired by Treaty with the Cherokee Indians.

"SEC. 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That as soon as may be convenient after the passage of this act, it shall be the duty of the Governor to appoint two commissioners, whose duty it shall be to superintend and direct the manner in which the said lands shall be surveyed and laid off; and it shall be the further duty of the Governor to appoint one principal surveyor, of skill and integrity, with full power and authority to appoint as many deputy surveyors, chain carriers, and markers, and to employ as many pack horses as may be necessary to complete the said surveying in the most speedy and effectual manner, and the said principal surveyor shall be responsible for the conduct of his said deputy surveyors in their official duty.

"SEC. 2. *Be it further enacted,* That the said commissioners, before entering on the duty by this act required, shall give bond and security, payable to the State of North Carolina, in the sum of ten thousand dollars, conditioned for the faithful discharge of their several duties as commissioners; and the said principal surveyor shall also, before entering on the duties by this act required, give bond, with sufficient security, as heretofore required of the commissioners, in the sum of ten thousand dollars, conditioned for the faithful discharge of his duty as principal surveyor.

"SEC. 3. *And be it further enacted,* That it shall be the

uty of the said commissioners and principa surveyor to scertain and fix upon some central and eligible site for the rection of the public buildings, which may hereafter beome necessary when that portion of the State may be erected nto a separate and distinct county; and to lay off four hunlred acres of land immediately surrounding the said site, nd to be reserved for the future disposition of the legislaure (except as herein provided). It is hereby the duty of he said commissioners and principal surveyor to lay out, vithin the said four hundred acres of land, one acre for the ublic square; and shall lay off two streets crossing each ther at right angles, which streets shall be one hundred feet n width; and to lay off twenty-four lots, of one-half acre ach, so that each lot may be one hundred and five feet fronting the street; and three fair plats of which shall be made by the surveyor, and by him returned to the commissioners, and by them deposited as hereinafter provided for the returns of the maps of survey.

"SEC. 4. *And be it further enacted*, That it shall be the duty of the said principal surveyor, under the direction of the commissioners aforesaid, to cause all the lands of this State, lately acquired by treaty from the Cherokee Indians, to be laid off into suitable districts for the convenience of surveying, and number the said districts progressively; and to lay off and survey each district, or so much thereof as they may deem practicable, into tracts, containing from fifty to four hundred acres, and to be so laid out, where the same can be done, as that each tract may include a suitable and necessary portion of the timbered, mountainous or broken land, as will be sufficient for building fences, fuel, and other necessary purposes: And the principal surveyor shall cause to be plainly marked on the beginning corner of each tract, and fronting said tract, the number of the district and tract, as the case may be; and shall cause all other corners to be plainly marked in the usual manner; and shall cause all lines by him run to be measured and plainly marked, where the same may be practicable; and shall lay down in his field

book a fair plat of each and every tract by him surveyed, together with the district and number of the tract, as well as the quantity and quality: Being first, second, third, fourth, and fifth, as also a descriptive account of the lines and corners of each tract by him surveyed. And the said principal surveyor, under the direction of the commissioners shall cause to be surveyed so much of the said Cherokee lands as, in their opinion, will command the sum of twenty cents per acre; and the residue of said land shall remain subject to the disposition of a future legislature, and shall not be liable to be entered in the entry taker's office of the county of Macon; and when hereafter exposed to public sale, lands of the first quality shall not be sold for a less sum than four dollars per acre; and lands of second quality not less than two dollars per acre; and lands of the third quality not less than one dollar per acre; and lands of the fourth quality, not less than fifty cents per acre; and lands of the fifth quality, not less than twenty cents per acre."

The remaining sections of this act have no bearing on the controversy.

Tennessee Act of 1836, *Chapter* 2, *Making Provision for the Survey of Lands Acquired from the Cherokee Indians within the State of Tennessee.*

"An Act to Provide for the Survey of the Lands Ceded to the United States by the Cherokee Nation of Indians within the State of Tennessee, by the Treaty of the 23rd Day of May, 1836.—Passed, Oct. 18.

"SECTION 1. *Be it enacted, etc.*, That the public lands of this State, ceded by the Cherokee Nation of Indians to the United States by the treaty of the 23rd day of May, 1836, shall constitute a surveyor's district, which shall be known by the name of "Ocoee District," and there shall be appointed

by joint vote of the General Assembly, a Surveyor General thereof, who shall hold his office for three years and until his successor shall be appointed.

"SEC. 2. That it shall be the duty of the Surveyor General to engage a sufficient number of skilled surveyors as his deputies, for whose conduct in all points touching his office, he shall be responsible, whom he shall cause without delay, to run out and survey the said public lands in the manner hereinafter directed. He shall have authority to administer the necessary oaths to them, to remove them for negligence or misconduct in office, and to form such regulations for their government as may be necessary, in addition to those hereinafter prescribed for carrying this act into effect.

"SEC. 3. That before he enters upon the discharge of the duties of his office, he shall, before the judge of third circuit, enter into bond in the sum of fifty thousand dollars, with five sureties to be approved by said judge to the Governor of the State, for the time being and his successors in office, conditioned for the true performance of the duties of his office, which bond shall be lodged by said judge in the office of the Secretary of State.

"SEC. 4. That if he shall fail to comply with the conditions of said bond, the Governor for the time being, is hereby directed to cause a suit to be brought on a copy of said bond for the use of the State, and the Governor is hereby directed from time to time to assign a copy of said bond to any person or persons who may apply for the same, and who may sue on such copy, and shall be entitled to recover any damages, he, she or they may sustain by reason of a breach of the conditions of such bond, which shall not be void on the first recovery.

"SEC. 5. That he shall before entering on the discharge of his duties, take and subscribe before the said judge the following oath:

> "'I do solemnly swear that I will faithfully and correctly perform the duties of my office of Surveyor General according to the best of my skill and judgment, so help me God.'

"SEC. 6. That said district shall be surveyed in the following manner, that is to say:

"First. The Surveyor General shall establish a *basis line*, extending from a point on the bank of Hiwassee River, opposite the termination, on said river, of the main street in the town of Calhoun, south twenty degrees west, to the south boundary line of the State.

"Second. He shall run out the whole district on each side of the *basis line* into ranges six miles in width, by means of lines run parallel to the *basis line*, which ranges he shall distinguish by progressive numbers, east and west of said *basis line*, beginning with numbers one on each side of said *basis line*.

"Third. He shall then divide the said ranges by lines running at right angles with said *basis line* into townships six miles square, each numbered progressively from north to south.

"Fourth. In running the *basis line* he shall establish on it corners for townships at the distance of every six miles, and corners for sections at the end of every mile, and quarter-section corners at the end of every half mile.

"Fifth. The corner of each township shall be marked with progressive numbers from the beginning.

"Sixth. Each distance of a mile shall be uniformly and distinctly marked with marks different from those of the corners.

"Seventh. The whole of said townships shall be subdivided into sections, containing as near as practicable six hundred and forty acres each, by running through them each way parallel lines, each at the distance of one mile, and by making a corner on each of said lines, at the end of every half mile.

"Eighth. The sections shall be numbered respectively, beginning with the number one at the northeastern corner of the township and proceeding west and east, alternately, through the township with progressive numbers, till the thirty-six shall be completed.

"Ninth. At each corner made as aforesaid, the surveyor shall cause to be marked on a tree or post within the section, the number of each section, and over it the number of the township and range within which such section may be, and carefully note, in his field book, the name of the corner thus marked and made.

"Tenth. *The fractional parts of townships,* wherever situated, shall be divided and numbered, as is hereinbefore directed in regard to entire townships, into quarter sections, and should there remain *fractions of quarter sections,* the number of acres contained in them shall be ascertained and noted in the surveyor's field books.

"Eleventh. All lines shall be plainly marked and measured with chains containing two perches of sixteen and one-half feet each, and said chains shall be adjusted by a standard to be kept for that purpose.

"Twelfth. The surveyor shall note in his field books the true situation of all mines, salt licks, mill seats and springs of water which shall come to his knowledge, all water-courses over which the lines he runs shall pass, with the distance from the corner of the section, and also the quality of the land, with the distance its quality continues uniform.

"Thirteenth. In each township the surveyor shall lay off and distinguish in his general plan and on his township maps, the *sixteenth section,* if fit for cultivation, and if not, then the section nearest thereto which shall be fit for cultivation, to be reserved for the use of schools, in such township forever.

"Fourteenth. It shall be the duty of the Surveyor General of said district, to have surveyed all the islands in the Tennessee and Hiwassee rivers within the ceded territory in the limits of Tennessee, and have them subdivided into quarter sections of one hundred and sixty acres each, or as nearly so as practicable, giving the number of acres in each fractional quarter, and shall note the same in his general field books.

"Fifteenth. The field books shall be returned to be kept

and preserved by the Surveyor General, who shall cause a connected plat of the whole district to be made out to be kept in his office, a copy of which he shall furnish the officer or officers who may superintend the final disposition of said land, and shall cause a descriptive plat of the whole land surveyed, on a scale of three hundred and twenty poles to the inch, to be made out and transmitted to the Secretary of State, on or before the meeting of the next General Assembly. He shall also cause a fair plat of each township to be made out, together with the sections and fractional parts of sections contained in said district, describing the subdivisions and marks of the corner, which plats shall be recorded in books to be kept for that purpose, and a copy of said plats shall be kept in his office, and at the place where said lands shall be disposed of, for the instruction of the people.'

"Sixteenth. The surveyor shall plainly mark the *basis line* and the township lines, with a blaze and a chop, above and below, on all fore-and-aft trees and near side lines, and all sectional lines shall be plainly marked with two chops on all fore-and-aft trees and side lines, and shall mark ¼ and the letter S on a stake or tree with two pointers at each corner of a quarter section on a section line.

"Seventeenth. The surveyor shall cause the whole of said district to be surveyed and the plats to be made out before the meeting of the next General Assembly.

"Eighteenth. The surveyor for his services, shall receive out of any money in the treasury not otherwise appropriated, the following compensation, viz: For each and every mile by him surveyed and marked as hereinbefore required, west of the *basis line*, two dollars and fifty cents, and for each and every mile so surveyed and marked east of the *basis line*, three dollars and fifty cents.

"Nineteenth. In surveying the said lines east of *basis line* it shall be the duty of the surveyor wherein gold may have heretofore been discovered, or may be discovered by him, or otherwise come to his knowledge, to run out and mark the

sections and quarter sections into forty-acre tracts, and plainly designate and lay them down on his general plan.

"SEC. 7. That the office of Surveyor General of said district shall be located at Cleveland, in the County of Bradley."

* * * * * * *

"SEC. 10. That nothing in this act contained shall be construed to authorize any entry or appropriation or right of occupancy of any of the lands hereby directed to be surveyed, and which were ceded by the Cherokee Indians by the late treaty, or to extend our laws for the entry of vacant and unappropriated lands over any part of said territory, and all entries thereof shall be null and void, till the same may be authorized by the future legislation of this State, except as hereinbefore provided."

Tennessee Act of 1837, *Chapter* 2, *Entitled An act to Dispose of Lands in the Ocoee District, Providing Only for the Entry and Grant of Lands Which Had Been Sectionized and Are Shown on the Surveyor's Map of That District.*

Tennessee Act of 1854, Chapter 22, Making Provision for the Entry and Grant of Vacant Lands in the Ocoee District.

"An Act to Dispose of Any Vacant Lands in the Ocoee District.

"(Passed Feb. 25.)

"SECTION 1. *Be it enacted, etc., That all, or any of the vacant lands in the Ocoee District* may be entered by a general entry in the entry-taker's office in the said district at Cleveland, *whether the same be designated on the map of*

said district or not. If the lands entered under the provisions of this act be designated on the map, they may be entered on the terms of paying the fees of officers, as heretofore provided; but if they do not appear on the map, the enterer shall present to the entry-taker, an entry, in writing, designating the beginning of the entry, and the prominent points or established lines, giving as near as may be the boundary, which the entry-taker shall record and preserve and furnish a copy to the enterer, who shall pay the usual fees for said service. And the surveyor of said district, or the surveyor of the county in which the lands so entered may lie, shall survey the same and make thereof a plat and certificate, from which the register of said district shall issue a grant to the claimant."

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 4, Original.

IN EQUITY

STATE OF NORTH CAROLINA, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

REPLY BRIEF ON BEHALF OF THE STATE OF TENNESSEE.

FRANK M. THOMPSON,
Attorney General of Tennessee.
CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

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REPLY BRIEF ON BEHALF OF THE STATE OF TENNESSEE.

May it please your Honors:

An examination of the brief and so-called "abstract and analysis of evidence" filed on behalf of North Carolina discloses so many inaccurate statements of and interpolations into the evidence that in the time allowed for preparation of this reply we can only refer to and point out some of those which are most patent and material.

In

64th Mile Tree Not One Mile, but Only 1,820 Feet Northeast of Tennessee River.

On page 12 of the brief filed on behalf of complainant we find the following:

> "From the Cataloochee turnpike to the 64th mile tree, **about one mile northeast of the Tennessee River**, the line is not in dispute. When the commissioners reached this point they were running about south 45 degrees west. Looking from this point on the Smoky Mountain across the Tennessee River the commissioners could see the whole Slick Rock basin and the mouth of Slick Rock Creek. To the left was Hangover. Immediately in front of them was Big Fodderstack, and to the right was Little Fodderstack. The course from the 64th mile tree to the mouth of Slick Rock Creek is south 75 degrees west."

There are four distinctly **inaccurate** statements contained in this quotation, to wit:

1. As to the distance from the 64th mile tree to the Tennessee River.

The 64th mile tree was not found, but its location was attempted to be determined by measuring from the 59th mile tree, which is still standing and marked. Taking the measurement of Burns and Gannett from the 59th mile tree along the undisputed boundary line toward the Tennessee River, five miles ends just 1,820 feet from the river, and not "about one mile northeast of said river," as stated on page 12 of said brief.

The materiality of this inaccurate statement on behalf of complainant is manifest when it is considered that the mouth of Slick Rock Creek is not visible at all from where the 64th mile tree formerly stood, according to the measurement of Burns and Gannett, but it is necessary to run back from the river about a mile before a point is reached where,

even according to Burns, there is a glimpse, not of the waters of Slick Rock, but of the gorge or bed of the creek.

This statement contained on the brief of complainant is harking back to the old contention of Hopkins, Cozad and Burns in the bill of review case, when Burns projected back from the mouth of Slick Rock Creek toward the mountain on the north side of the river a line on the supposed course of the line shown on the map of 1821, which reached the river, and which he was finally induced to admit appeared on a map filed by him in said bill of review case, a copy of which was made Exhibit "X" to his deposition in this case, and is found in the printed record at page 321. This was the original claim of Cozad and Hopkins in the bill of review case, and of North Carolina in this case, as stated in her bills, that the line departed from the extreme height of the mountain about one mile northeast of the river. Burns endeavored to deny this, but unsuccessfully, and with reluctance on his part he was induced to lay down the same line in red ink on a copy of Complainant's Exhibit "D," which is found in the record at page 336. However, this line before it reached the mountain instead of being one mile lengthened out to 5,800 feet, while along the line as measured and claimed by Burns and Gannett the distance instead of being a mile was 8,269 feet.

Rec., pp. 336, 343, 347-349, 350.

So, it seemed necessary for complainant to locate the 64th mile tree, "about a mile" northeast of the Tennessee River in order to give color to their argument, not testimony, that from such point on the mountain the commissioners of 1821 got a glimpse of Slick Rock Creek, and therefore sighted the next line to it from the end of the 64th mile, but the facts do not bear them out as to the location of the tree, and hence the whole argument based thereon falls.

2. The next inaccurate statement is that when the commissioners reached this point, to wit, the 64th mile tree, they were running about south 45 degrees west.

At a point on the undisputed line 1,820 feet from the river, where, according to the measurement of Burns and Gannett, the 64th mile tree, if standing, should have been found, the commissioners were not running south 45 degrees west, and there is absolutely no proof in this record that they were running on that course. If by that statement complainant intended to refer to the actual running as made by Burns and Gannett, the course instead of being as stated in the brief, was south 15 degrees 7½ minutes west (Rec., p. 665), which did not run either in the direction of the mouth of Slick Rock or point out Fodderstack, which was doubtless the inference sought to be suggested by the statement in regard to the course of that line.

3. Approaching the Tennessee River from the northeast along the undisputed line, Hangover is not to the left, as stated on the brief, but directly in front.

4. The course from the 64th mile tree to the mouth of Slick Rock Creek is not south 75 degrees west, as stated on said brief.

Complainant must needs pick some place to be on the crest of the mountain about a mile from the river, where a glimpse of the gorge of Slick Rock Creek can be secured along the approximate course contended for by complainant, but, as stated above, the location of the 64th mile tree, even according to the measurement of Gannett and Burns, destroys their entire argument. Taking the 64th mile tree to be 1,820 feet from the river, a course of south 75 west from such point would not run to the mouth of Slick Rock Creek, but would cross Slick Rock Creek 970 feet above its mouth, and instead of ending at the creek, pass beyond it about 1,600 feet, as shown by the red line laid down on

Exhibit "AA" to the deposition of John L. Williams, found in the printed record at page 1556, and the testimony of said Williams set out on pages 1555 and 1556 of the record. No attempt was made by complainant to dispute the accuracy of Williams' testimony on this point.

Just why it is stated on page 13 of complainant's brief that the commissioners after turning down the river from the fore and aft tree and reaching a point opposite the mouth of Slick Rock, "took the course across the stream," we cannot imagine, or just what authority there is for making that statement we do not know, because there is not a syllable of proof in this record to justify that statement.

All North Carolina Entries and Grants Within the Disputed Territory Do Not Call for Slick Rock Creek as the State Line.

On page 16 of complainant's brief, reference is made to the fact that the lands secured by North Carolina from the Cherokee Indians were not open for entry in that State until 1852, when the lands were thrown open for entry and a large number of entries were made and grants issued at once for lands lying in the disputed territory at Slick Rock. Then complainant in her brief states "in **all** these entries and grants the State line is called for as running up Slick Rock Creek." **This statement**, doubtless intended to suggest that North Carolina had uniformly and at all times claimed that the State line was at Slick Rock, as evidenced by all acts of her executive and administrative officers in dealing with land titles in that vicinity, **is directly in the teeth of the facts.**

Though some entries do call for the State line as being at Slick Rock Creek, or in that vicinity, the evidence of Hayes and Burns is conclusive to the effect that North Carolina, in allowing entries and issuing grants, had not stopped at Slick Rock, but extended some three or four miles to the west and

north of Slick Rock—to the top of Little Fodderstack Ridge and to the west thereof.

Hayes, Rec., pp. 830, 841-842.
Burns, Rec., p. 297.

Further, the above-quoted statement in the brief is shown not to be in accord with the facts by a North Carolina grant which complainant offered in evidence, but did not include in her order for printing the record (Rec., p. 76), the reason therefor being obvious in view of the testimony of A. C. Williams (Rec., p. 992). This grant No. 8234 to William H. Thomas, and surveyed by Pearcy, surveyor of Cherokee County, and much relied on by complainant, calls for beginning on a small spruce pine on the State line at the mouth of Slick Rock Creek, "and runs with the State line south 25 east 221 poles," etc. This course, instead of running with or calling for the boundary line up Slick Rock Creek, indicates and calls for the State line as running from about the mouth of said creek directly to the crest of Hangover Ridge, as shown by the testimony of A. C. Williams (Rec., p. 992), and as indicated by the green line laid down on the composite map Exhibit "B" to defendant's original brief—said green line running from the mouth of Slick Rock Creek to the Hangover Ridge.

If it had been a fact that the North Carolina entries and grants uniformly called for Slick Rock Creek as the State line, such fact would have greatly strengthened North Carolina's contention; but that does not warrant a statement so utterly in the teeth of the facts as is the quotation above set out.

Ocoee Map.

On page 16 of her brief complainant insists that Tennessee, by her survey of the Ocoee land district and the map exhibiting said survey, recognized Slick Rock Creek as the boundary between the States.

In our original brief (pp. 49-53) we discussed this question to some extent, and now we only deem it necessary to point out again that, while the Ocoee district survey stopped at Slick Rock Creek, the map thereof does not indicate that immediately east of said creek is North Carolina.

See map, Rec., p. 88.

But—and this is not noticed by complainant—the survey of the Ocoee district did cover the lands lying around the headwaters of Tellico; said lands were surveyed and sectionized as shown by the map of that part of said district which appears in the record (p. 1158), and here we call to the attention of your honors that on the plat of this part of the Ocoee district the Surveyor General of Tennessee did mark just east of the sectionized lands the words "N. Carolina"—thus indicating that to the east of the survey lay North Carolina. How significant is the absence of these words on the map showing Slick Rock Creek—a map made by the same man who made the map showing the survey around and to the east of the headwaters of Tellico River!

The North Carolina Map of 1837 Does Not Show the Boundary Line to be Along State Ridge and Crossing Tellico River.

One of the most remarkable statements in complainant's brief is that found on page 16 as follows: "The North Carolina survey and map of 1837, as well as grants made when lands in that vicinity first became subject to entry, **just as plainly claimed to the line down State Ridge and crossing Tellico.**"

Just how complainant justifies that statement it is impossible for us to imagine, because said map plainly shows a line leaving the Tennessee River on the crest of a ridge or mountain, and running on an unbroken mountain ridge around and to the east of Tellico River, and **not crossing** Tellico River at any point. A copy of this map is found in the printed record at page 1576.

It is to be noted that Tennessee served notice upon North Carolina to produce the original of this map, and also the report of the surveys from which it was compiled, but thus far North Carolina has failed to comply with said notice; therefore we submit that the fair inference is that said surveys would not sustain North Carolina's contention, but would show, as does the map compiled by North Carolina's Surveyor General from said surveys, that the boundary line, as then claimed by North Carolina, runs to the east of the headwaters of Tellico River and follows an unbroken mountain course to the Tennessee River.

As to the presumption against a party withholding competent and pertinent evidence, see *Kirby vs. Tallmage*, 160 U. S., 379; *Pacific Construction Co. vs. B. W. Co.*, 94 Fed., 180.

Tree Number 30.

We have fully discussed the marking on this tree on pages 105 to 107 of our original brief, and we will only note the statement contained on page 18 of complainant's brief that there is no evidence that any survey was ever made in this country before 1821; but this record does show, as pointed out in our original brief, other trees bearing State-line marks made in 1821, which are off of and away from the contention of either of the parties in this cause.

Burns' Pine Tree Near the Mouth of Slick Rock Creek.

On page 19 of her brief complainant says in substance that the line crossed the Tennessee River to a point about twenty yards below the mouth of Slick Rock Creek, where there was a large pine tree that bore State-line marks.

Just why the commissioners or any one else should have, in the abundance of timber in that locality, gone to a point twenty yards below the mouth of the creek rather than to the creek itself it is somewhat difficult to imagine.

It is claimed that this tree is one called for in the Davenport notes, and its location is predicated upon the testimony of Dr. Patton and the always ready Burns.

Dr. Patton testifies to too much, and Burns is flatly contradicted by one of complainant's own witnesses. Dr. Patton, examined in the old case of Hebard *vs.* Belding, testified that he followed a marked line **to within 300 or 400 yards of the head of Little Slick Rock Creek,** which would be some two miles off of North Carolina's present contention; that then he concluded that the line ran "down the ridge between two forks of Slick Rock;" that four or five miles from the Tennessee River he found an old line leading down by the creek just outside of the laurel as near the creek as they could get along, and traced it down the creek that way to the creek's mouth, and found a large pine tree marked ten or twelve steps below the mouth of Slick Rock; that the marks were not distinct, but were "old marks" (Rec., p. 869).

This marked line traced by Dr. Patton down Slick Rock Creek "outside of the laurel," and as near the creek as they could get but for the laurel, is manifestly not the line run up Slick Rock Creek by Burns, which crossed said creek back and forth twelve or fifteen times, and is additional evidence of other lines in that same locality, many of which were doubtless made by Indians, whose habit of imitation oftentimes led them to making marks on trees similar to those made by white men. In any event, this Dr. Patton line is not in accord with the Burns line. Moreover, Patton says he followed a marked line down the creek and outside of the laurel for a distance of about five miles, when the undisputed facts are, as shown by the testimony cited in our original brief, that for a distance of somewhat more than three miles along Slick Rock Creek not even Burns or Gannett was able to find any marked trees—not able to find a semblance of a marked line.

Now, it is true that Burns did claim that after the dis-

covery of the Davenport notes he made another expedition into the disputed territory (no doubt for the purpose of finding a pine at or near the mouth of Slick Rock), and he found on the south side of the river about twenty-five feet from the water's edge, both of Tennessee River and Slick Rock Creek, a large white pine, but he "could not determine anything satisfactory in regard to marks * * * and there was no way of determining whether or not it was the original State-line mark" (Rec., pp. 726-727).

He then stated that this tree had been "blown up by the roots and the whole tree lies right down the Tennessee River. The whole tree is there yet" (Rec., p. 727).

On this expedition Mr. Burns had carried along with him a Mr. Slagle, who was introduced by complainant, and on cross-examination he stated that he and Burns found a "pine stump" below the mouth of Slick Rock Creek; that about three feet of the same was above the ground, and that the tree had not been cut down or broken down; that there were not any marks on the same, and there was not any part of the tree there from which to ascertain whether it had been marked or not (Rec., p. 767).

Alleged Bearing to Big Fodderstack.

On page 23 of her brief complainant says that the bearing of the map of 1821 to Big Fodderstack is south 43 degrees and 25 minutes west. But this is arrived at by Burns arbitrarily selecting a certain point on the map of 1821 as Big Fodderstack (Rec., p. 241), as he did other points in order to bear out his argument. It is to be noted that there is no point on the map of 1821 designated as Big Fodderstack or Junction or County Corners, yet Mr. Burns has no sort of difficulty in assuming the exact location of each of these places on said map, and having thus furnished himself with a predicate he proceeds with his argument in favor of the complainant.

And just here, inasmuch as complainant, or rather Burns for Hopkins and Cozad, insists and reiterates that Big Fodderstack is in the same general direction of the boundary line as it approached Tennessee River as shown on the map of 1821, that claim is effectually disposed of and shown not to be in accord with complainant's contention by an extension of the boundary line crossing said river, as shown on the map of 1821, to a point about seven miles to the southwest thereof, according to the scale of said map. This was done upon Exhibit "A" to Onley Williams' deposition (Rec., p. 76) by John L. Williams, as shown in his testimony on page 1475 of the printed record.

It is to be noted that defendant in cross-examining Burns had him to locate on said Exhibit "A" to Williams' deposition his claim as to that part of the map which showed Fodderstack, and the line crossing the river extended the proper distance runs back three and a half miles west and north of where Burns located Fodderstack on said map of 1821, but does run to and about the place where defendant insists Fodderstack appears on said map—that is, to a range or ridge running almost at right angles to the boundary line.

The delineation of the Hangover ridge and the location of Hangover and Stratton Bald on Exhibit "A" to Williams' deposition, which was done by Burns under his cross-examination by defendant (Rec. pp. 328-332), showed the absurdity of complainant's claim, and would cause the stream marked creek, if it be Slick Rock, according to the contention of complainant, to run principally to the east of Hangover, and before it reached the Tennessee River to cross the Hangover ridge where it is perhaps two thousand feet above the river and above said creek as it actually lies on the ground.

Map of 1821 Further Misconstrued by Complainant.

On page 23 of her brief complainant states that "according to the North Carolina contention the line crosses the Tennessee River at the mouth of Slick Rock Creek, and unless

you absolutely disregard both the course and distance and the creek shown on the map you can cross at no other place."

We have already shown in our original brief that the map cannot be relied on either for specific course or for exact or even approximate distance, but the fact is, as we have shown in our original brief, the map does not show the line crossing the river **at** the mouth of any stream, but according to the scale of said map the line crosses the river, not at the mouth of the stream marked "Creek," but sixty poles or 990 feet below the mouth of the stream marked "Creek."

Rec. pp. 1174-5, 1197.

Complainant wholly ignores the report of the commissioners, which though it called for crossing the Hiwassee River at the mouth of an insignificant little stream called Cane Creek, nevertheless makes no reference to the mouth of any stream where the boundary line crosses the Tennessee River.

Is not this significant against North Carolina's contention?

Every surveyor offered by North Carolina says that if he had run and adopted a line crossing the Tennessee River at the mouth of a creek he would have shown that fact in his report.

Complainant in her brief on page 23 further states that "according to the Tennessee contention immediately after crossing the river the line runs up a ridge," and this is correct, but then complainant adds, "the map shows that it runs up a creek for a considerable distance."

Your honors will see even from the copies of the map of 1821 found in this record, but much better from the original map itself, that while immediately south of the river the boundary line does appear to be near, and perhaps for a mile and a half almost parallel in its general course with the stream marked "creek," nevertheless, the etching or hatchures on said map show, as contended by Tennessee, that immediately after crossing the river the line runs on a ridge, and this is admitted by no less authority than Mr. Gannett.

Rec. pp. 477, 478, 440.

Indeed, many significant admissions were wrung from Mr. Gannett after he had been confronted with the inaccuracies (?) in his testimony in relation to the maps in the Congressional Library, pointed out in our original brief.

The Davenport "Secretary."

In order, as we suppose, to show that the so-called Davenport notes were found in a proper place or receptacle for such valuable papers, complainant, on page 25 of her brief, refers again and again to the famous old Davenport "secretary," which unfortunately, as shown by Mrs. Cilley, was not a secretary at all, but was an old sideboard, and a most unlikely piece of furniture to have been used by Colonel Davenport as a writing desk. Moreover, Mrs. Cilley states that the old Davenport **secretary** had not been in the Davenport house for 30 or 35 years—and was not in the house when it was claimed that William Davenport Jones and his brother, Edmund Jones, found the so-called Davenport notes on November 10, 1910.

Rec., pp. 640-641.

We do not undertake to explain these discrepancies or their materiality; however, they do show that the Davenport notes did not come from an old writing desk, and complainant also failed to produce Mr. Edmund Jones, who is supposed to have been with his brother on November 10, when the so-called field-notes were found, and they did not deem it advisable to inform Mrs. Cilley, although she was in the house at the time, and was used by North Carolina as a witness to the handwriting found in said book.

The Bluff on the South Side of the Tennessee River Opposite the Fore-and-aft Tree on the North Bank is Not "Insurmountable."

Complainant, on page 27 of her brief and elsewhere, refers to the bluff opposite the fore-and-aft tree as being "insurmountable," for the purpose doubtless of suggesting an inference that neither the commissioners nor either of the surveyors in 1821 could have "scaled" that bluff, and consequently did not run or mark a line along Hangover Ridge.

While from the north bank of the river the blunt end of Hangover Ridge has the appearance of a bluff, nevertheless, it is by no means insurmountable, and some of the surveyors in this case testified to having gone up that bluff to the ridge, or down the bluff to the river from the ridge.

Rec., pp. 1652, 1656.

The Davenport Field-notes Calling for a Creek and the Tennessee Contention.

After following the so-called Davenport field-notes, as it is claimed, across the river to or near the mouth of Slick Rock Creek, complainant says: "The succeeding calls take you up a creek for several miles, and this again accords with the map, the marked line and the North Carolina contention, while there is nothing in the Tennessee contention that remotely resembles the calls of the field-notes from the 65th to the 70th mile."

Tennessee admits that the "succeeding calls" do run up a creek for some four or five miles, and that there is nothing in the Tennessee contention that even remotely resembles such calls for a creek, but Tennessee denies, and the evidence and record is with her, that these calls accord with the map of 1821, as stated by complainant. As we have already stated, the map shows the line to leave the river about 990 feet below the mouth of some stream, and

that from the river it proceeds or runs on a ridge near to said stream, and practically paral'el with it for perhaps a mile and a half, and then, as is admitted even by Burns, the boundary line from a distance of one and one-half miles proceeds southwestwardly on the crest of a mount, and not along any stream or creek. According to the North Carolina contention, within one and a half miles from the river on the south side the boundary line crosses Slick Rock Creek several times, but we apprehend that none of the counsel for complainant can be found to stand before your honors and claim that according to the map the line does anything of that sort.

The end of the second mile south of the river, according to the North Carolina contention, is directly on Slick Rock Creek, while the second mile circle south of the river on the map of 1821 is fully a mile and a quarter west of the stream marked creek.

According to Burns' contention for North Carolina the end of the 68th mile and the 68th mile tree stands on a little island in the **middle** of Slick Rock Creek, while according to the map of 1821 the third mile circle south of the river is nearly two miles west of the stream marked creek.

Can it be imagined that a surveyor locating a mile tree in the middle of a stream would then draw a map showing that mile tree to be two miles west of the stream?

According to the North Carolina contention and the Davenport notes the 69th mile tree is on the **east** bank of this stream, which is claimed by North Carolina to be Slick Rock Creek, while the map of 1821 shows the 69th mile circle to be not on the east bank but about **two and a half miles west of the stream marked "creek."**

Indeed, running south from the river the boundary line is shown for the first mile and a half to be on the side or crest of a ridge, and then along the crest of the main mountain, as called for in the Cession Act, the report of the commissioners and the confirmatory acts.

"The Tellico Section."

On page 27 of complainant's brief appears the remarkable statement that:

> "The evidence is plenary that in the Tellico section the notes accord with the map, the marked lines and the North Carolina contention."

We have discussed the question of the marked lines in the Tellico section in our brief, and will not further enlarge the brief by restating our position in regard thereto, but even a casual examination or comparison of the map of 1821 with the Davenport notes or the North Carolina contention, shows the gross inaccuracy of the statement that the map accords with said contention or said notes. The face of the map shows a line on top of the mountain and to the east of the headwaters of Tellico River—that is admitted even by Gannett.

And it being established that the map shows a line on the main divide of the mountain around and to the east of the headwaters of Tellico River, there can be no reconcilement between that map and the North Carolina contention—the two are utterly inconsistent.

An Interpolation Into the Report of the Commissioners of 1821.

In the strained effort to show agreement between the so-called Davenport notes and the commissioners' report, complainant goes to the length of interpolating into said report a statement, the materiality of which is thus recognized by complainant, and the absence of which from said report practically destroys complainant's contention.

On page 28 of her brief complainant states that "**the report of the commissioners calls for the following objects * * * a large creek emptying into the Tennessee River where the line crosses that river.**"

The original report will be before your honors on the argument of this case, and several copies thereof are to be found in the printed record, one of which appears on pages 51 and 52.

We challenge the ingenuity of learned counsel of complainant, or even the resourceful Mr. Burns, to point out where in said report the commissioners called for "a large creek emptying into the Tennessee River where the line crosses the river." It is the very absence of any such call in the commissioners' report that shows the great improbability, if not impossibility, of complainant's contention.

Each and all of the expert witnesses in this cause testified that if the commissioners had in fact crossed the Tennessee River **at** the mouth of the stream, and then run along that stream for any distance, such fact would and ought to have been noted in the report. That the importance of such a call was well known to the commissioners is obvious not only because they were men of intelligence, but because when under such conditions they crossed Hiwassee River "below the mouth of Cane Creek" they reported that fact in express words. The attempted interpolation of this call to the report of the commissioners shows the desperate straits to which complainant has been driven to bolster up her case—and demonstrates that she recognized its weakness in the absence of such a call or description in the report of the commissioners.

We have in our original brief noticed some of the discrepancies between the map and the Davenport notes and some of the natural objects called for on page 28 of complainant's brief, and we will not restate such matters.

However, we do call to the attention of the court that not one single natural object claimed by North Carolina along her contention on the **disputed boundary** is established. Her claim in relation to the alleged holly 86-mile tree we have fully answered in our original brief.

Judge Clark's Decision.

On pages 30 and 31 of her brief complainant sets out what, after an examination thereof, might appear to be the whole of Judge Clark's decision, but complainant omitted the most material part thereof, which immediately follows, on pages 1384-1385 of the record, that part quoted by her, and in summing up Judge Clark expressly held that the weight of the evidence was with the complainants. We set out his entire opinion, including that part quoted and the remainder omitted by complainant:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the facts that they obtained their grant earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained. If there was a basis for estoppel, or if the doctrine of estoppel could be applied to the State of Tennessee, a different question might arise growing out of the fact that the State has, through the Ocoee district commissioners, established its line at Slick Rock Creek, and has sectionized all the territory supposed to belong to the State. In the absence, however, of any ground on which an equitable view might be taken of the situation, I am constrained to believe that the weight of evidence is with the plaintiff as to the true location of the State line. I do not underestimate the great force found in the better marked line of the defendant. It must not be forgotten, however, that the commissioners in surveying and making the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river and it was the obvious and conspicuous

range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless, it would have been so natural and not necessary to avoid misleading for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction, that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given it would be impossible to run the line as claimed by the defendants.

"Looking at the case then from the legal point of view (and no other, it seems permissible), I am certain that by the weight of the evidence the case is with the complainants.

"As I concur with the commissioner in the reasons which he gives, as well as the conclusion at which he arrives, it is not necessary that I should go over the grounds separately. It results therefore that the exceptions to the commissioner's report are overruled, the report confirmed, and decree will go accordingly."

Judge Severens' Dissenting Opinion.

We have not deemed it necessary to analyze Judge Severens' dissenting opinion, and only notice the material statement contained in the quotation therefrom set out on pages 33 and 34 of complainant's brief, as follows:

> "The map shows the line run by the commissioners in distinct color, and it shows the line as it was contended to be by the defendants in the original case," etc.

Defendants Belding and others in the original case had first contended that the line ran along Little Fodderstack Ridge, but finally settled down to a contention along Slick Rock Creek. We are not familiar with what appeared in the record in the Court of Appeals when the case was tried and the decision reported in 194 Federal Reporter, but we are surprised to learn that it was made to appear therein that Slick Rock Creek was along the crest of the mountain, because if, as we have it admitted by Mr. Gannett, the map of 1821 shows anything, it shows that from the river running southwestwardly the line is on a ridge or the side of a ridge for the distance of about a mile and a half, and then it is on the crest of the main mountain.

What was made to appear to that able, learned and conscientious jurist, we are unable to say, but the fact remains that the map shows a line on the crest of the mountain, and not along the creek or a stream of any kind for a distance of five miles, as was claimed in the Hebard-Belding litigation, and is now claimed by complainant in this case.

"Reputation Evidence."

In addition to our discussion of the "reputation" evidence set out in our original brief (pp. 54-67), and in reply to that part of complainant's brief found on page 35, we desire to refer to only two facts.

John W. Stratton, to whose testimony we referred in connection with the controversy at Tellico River, is probably the oldest witness examined in this case. When he testified in November, 1910, he was about 83 years old (Rec., p. 1029), so that he was born in 1826 or 1827. The Stratton family were North Carolinians, who, prior to coming to Tennessee, lived in the territory contiguous to the State line. The Stratton family lived for a considerable time on or near to the Stratton Meadows, which are on an undisputed part of the boundary line between the Slick Rock and Tellico

contentions. The grandfather of this old gentleman who testified in this case was buried by his request on the boundary line, so that part of his grave is in North Carolina and part in Tennessee. One of the older brothers of John W. Stratton, whose name was Bob Stratton, lived in North Carolina just under the Hangover Mountain, and the Bob Stratton Bald, which joins and is, indeed, a part of the Hangover Mountain, took its name from this brother of John W. Stratton. Away back in the early part of the 40's, when John W. Stratton was a young man, he was all over and became familiar with the territory in dispute, and his brother, Bob Stratton, from whom Stratton Bald got its name, told him that the State line ran up the Hangover Ridge.

Rec., p. 1034.

In our original brief (p. 64) we have referred to the testimony of James L. Nelson, who was before the Civil War well acquainted with and the agent of William H. Thomas, and Nelson's testimony in relation to what Thomas told him (Rec., pp. 938-939) as to the State line being on the ridge—that is, Hangover Ridge—between Slick Rock Creek on the west and Bear Creek on the east, is borne out by Thomas' grant No. 8234, which was surveyed by Pearcy, and to which we have hereinbefore referred, the first call of which runs from down near the mouth of Slick Rock straight up to the Hangover Ridge, reaching the crest of the ridge perhaps a half or three-quarters of a mile southwest from the river, as shown by the short green line on Exhibit "B" to the original brief.

Cheoee River.

In relation to the stream marked "Creek," shown on the map on the south side of the Tennessee River, complainant on page 45 of the brief says:

> "No stream in that part of the world actually coincides with this line, even for the distance shown on

> the map, except Slick Rock Creek, and Slick Rock Creek actually coincides with the map for the several miles of distance."

This statement Tennessee challenges.

We have already shown that the location of the stream marked "Creek" on the map of 1821 is absolutely inconsistent with the location of Slick Rock Creek, as it runs on the ground; there is absolutely no similarity between them.

In our original brief (pp. 108-111) we have shown that Cheoee River, or Creek, as it is sometimes called, as it runs on the ground, approximately conforms to the location of the stream marked "Creek" on the map of 1821.

Speaking to this point, Judge McCall, in the Circuit Court at Knoxville—the opinion being reported in 194 Federal, 301—said:

> "From the location of this stream marked creek on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoee River and not Slick Rock Creek."

The Attitude of the Surveyors Named by Complainant.

On page 46 of her brief complainant gives the name of a number of surveyors, all of whom she insists acted independently of each other, and adopted the line up Slick Rock Creek as the true boundary between the States.

We have already shown that Mr. Percy, or Pearcy, formerly county surveyor of Cherokee County, in surveying the Thomas grant No. 8234, called for the State line as running from near the mouth of Slick Rock Creek (Rec., p. 992) south 25° east, which carried it up to the top of Hangover ridge. In our original brief we show how Mr. Hayes, prior to his employment by Belding, was of the opinion that the line was west of Slick Rock Creek; indeed, that the "tradition" in North Carolina was that the line ran up to the Little Fodderstack ridge. The other surveyors named made

no independent examination of other localities before they went directly, under the employment and direction of Belding, as we have shown in our original brief, to Slick Rock Creek, and there ran and attempted to locate the boundary line; but both Hayes and Hyde admit, as we have shown in our original brief (pp. 69-73), that had they been running the line according to the North Carolina contention **they would have noted the turn down the river on the north bank,** and also that it ran up Slick Rock Creek; they further admit, in substance, **that if they had run according to the calls of the act of 1821,** from the marked fore-and-aft tree on the north bank of the Tennessee River opposite the Hangover Ridge, **they would have gone the most direct way or line to the Hangover Ridge—that is, Hangover.**

Rec., pp. 807-808, 844, 845.

Mr. Slagle, who was taken there by Burns, made no sort of a survey; does not even claim to have made any survey, and when stressed in his defense of North Carolina's contention he was driven to contend that **the map of 1821 "don't conform with the contention of North Carolina or Tennessee either, at all."**

Rec., p. 773.

Brief on North Carolina Contention at Tellico.

That part of complainant's brief dealing with the contention at Tellico, except for casual references elsewhere, covers only about three-quarters of page 47 of said brief.

Hopkins and Cozad are interested only in the lands covered by the disputed territory between Hangover and Slick Rock, and it is to be borne in mind that this was the only dispute or controversy mentioned in the original bill which Hopkins and Cozad had procured North Carolina to institute under a bond guaranteeing complainant immunity from costs and expenses. It was not until the Babcock Land & Lumber Company sought to intervene and showed the

private nature of the controversy that the amendment was asked for covering the so-called dispute at Tellico.

Complainant in respect of this controversy practically contents herself with the statement found on page 47 of the brief—in addition to her reference to the case of Stevenson *vs.* Fain—with the following statement:

> "If there is a reply attempted to this portion of the map of 1821 on the part of Tennessee it has escaped us."

Lest our discussion of this question in the original brief may also escape complainant, we take the liberty of here stating that Tennessee's contention is that the true boundary line follows according to the calls of the Cession Act, of the report of the Commissioners, and of the confirmatory acts of both States, the extreme height of the main ridge of the mountain, which is shown by Mr. Gannett to be around the headwaters of the Tellico River by way of McDaniel Bald, and Tennessee insists that the map of 1821 shows the boundary line to be on the crest of a mountain entirely east of the headwaters of Tellico River.

Further, Tennessee insists that North Carolina in 1837 by the map which in that year she caused to be made, recognized the true boundary line as being on the crest of the mountain, and to the east of the headwaters of the Tellico River.

Complainant's Misconception of Tennessee's Contention.

On page 50 of her brief complainant undertakes to somewhat chide defendant and to point out her duty in relation to setting up her contention, and then, doubtless to her own satisfaction, complainant insists that apparently Tennessee has not so apprehended the matter—as complainant would have her—and has not always been consistent in respect of her claims as to the location of the true boundary line.

The complacency and assurance of this proposition is admirable.

As we have shown, North Carolina has changed her contention some four or five times, and doubtless it is to divert attention from her acts in this respect she now claims or suggests that Tennessee has been in like position.

We challenge this—whether it be a charge or a suggestion, because from the beginning of this controversy Tennessee has insisted that the line passed directly from the fore-and-aft tree on the north bank of the river on the same course running through said tree, crossed the Tennessee River, thence along the Hangover Ridge and Hangover Mountain, to the undisputed boundary southwestwardly. Tennessee never contended, even after the finding of the map of 1821, that the boundary line crossed the Tennessee River "**at** the mouth of a large creek on the south bank"—nor did she contend or endeavor to show that the line crossed the Tennessee River **at** the mouth of Cheoee River. The map does show, according to its scale, that the boundary line crosses the Tennessee River **about one thousand feet below the mouth of a stream**—not **at** the mouth of the stream, and inasmuch as it is admitted that the streams on said map of 1821 were not located thereon by actual measurement, Tennessee has insisted and does insist that it is established that the stream to the eastward of the boundary line, as shown on said map of 1821, is Cheoee River or Creek. The reasons for this we have heretofore in our original brief fully set out.

On page 53 of her brief complainant undertakes to quote the contention of Tennessee, but whether intentionally or by inadvertence omits the most material call controlling the location of the boundary line just south of the Tennessee River. If complainant had not left out of that quotation where some "* * *" are inserted, the words "**from Tennessee River to the main ridge,**" the contention of Tennessee would have been more accurately and intelligently stated, and it would have been as it is. In other words, Tennessee's contention is that the boundary line follows the summit of

the Great Iron or Smoky Mountain on the extreme height thereof to where it strikes the Tennessee River—then **from Tennessee River to the main ridge,** and along the extreme height of same to a place where it is called the Unicoy or Unaka Mountain.

Of course, no one ever contended that the boundary line crossed the Tennessee River on the extreme height of a mountain as that question is solemnly discussed on pages 51 and 52 of complainant's brief, but Tennessee does claim that the boundary line, according to the calls of the Cession Act, runs along the extreme height of the Great Iron or Smoky Mountain, and that it approaches the Tennessee River from the north on the extreme height of said mountain **at the particular place** where it goes down to the river—as was reported by the commissioners, and as is stated in the confirmatory acts of both States, and then, as reported by the commissioners of 1821, the line runs from the south bank of the river immediately opposite the fore-and-aft hemlock tree to the main ridge, which the evidence indubitably establishes to be Hangover, and thence along the extreme height of said main ridge, which would carry it around to the east of the headwaters of Tellico River by way of McDaniel Bald to the Unicoy or Unaka Mountain, and there can be no doubt but that the mountain was not called Unaka until that part of the main ridge was reached around to the west of the headwaters of Tellico.

Now, returning to the line just northeast of the Tennessee River: The boundary line from the northeast approaches the river upon the extreme height of the Smoky Mountain at that particular place, and we challenge this record for any evidence to the contrary. It is true that in his desperation Burns would have had the inference drawn from some of his statements that there was a spur northeast of this which broke off and went to the Tennessee River several miles below Slick Rock, but that this was pure guesswork, and without basis of fact to support it, appears from his admission that he himself had never been back on the moun-

tain far enough to see the ridge or spur he was talking about. Northeast of the river there has never been a doubt but that the line ran where Tennessee claims it to be, along the extreme height of the mountain.

Complainant in her brief has a good deal to say about prongs or branches, or branch ridges, and that the Cession Act does not call for the highest prongs or highest branch, but the Cession Act and the report of the commissioners do call for the extreme height of the mountain, and that call is answered in every respect by the contention of Tennessee.

Complainant on page 52 of her brief reiterates in different form her insistence that the Fodderstack Ridge has a greater average height or continuity of height than the Hangover Ridge, along which Tennessee's contention runs. In reply to this we merely call attention to the reluctant testimony of Mr. Gannett (Rec., p. 471), where he was made to show the respective elevations of the North Carolina and Tennessee contentions at intervals of one-half mile from Tennessee River for a distance southwestwardly of seven miles, and he then admitted that the greater average elevation was with the Tennessee contention.

See Original Brief, pp. 101-102.

In regard to the contention at Tellico, we find on page 53 of complainant's brief the remarkable statement that "**in the Tellico country the extreme height of the mountain has been followed in the contention of North Carolina.**"

In reply to this we merely call to the attention of your honors the map Exhibit No. 1 to the deposition of W. D. Hale, found in the printed record at page 1144, whereon, in red ink, are inserted the elevations along the North Carolina or State Ridge contention, and also those along the Tennessee contention, that is, on the main ridge around the headwaters of Tellico—the main dividing ridge—and these elevations show beyond question that the statement just

quoted from complainant's brief is without any sort of basis in fact to support it.

Indeed, it is nowhere contended by any of the evidence of complainant that the line which the commissioners were perhaps misled into running down a ridge which lost itself before it reached the Tellico River, was the extreme height of the mountain.

Nor do we remember any testimony whatsoever that justifies the statement that said ridge, "**ever since 1821,**" has been known as State Ridge. Some of the witnesses say that this appellation was given to said ridge about the time this controversy arose, but others carry the name back some fifty or sixty years, which would be about the time the Fains began to enter land in the disputed territory around Tellico, and that they are adepts in the manipulation of evidence in regard to the location of the State line is shown by the fact that in the case of Stevenson *vs.* Fain they made it appear that the line reached the main mountain at Bryson's Gap, while the evidence in this case shows that they were waiting for Messrs. Burns and Gannett at Jenks Knob, and carried them down from thence to the so-called holly 86-mile tree, in respect of which they adduced such proof in Stevenson *vs.* Fain as to cause the court to find that said tree had been blocked, when as a matter of fact no blocking of that tree was ever made or could have been made, because of its hollow condition, as is unquestionably established in this record.

The "**Abstract and Analysis of the Evidence in the Record**" prepared by the State of North Carolina is so variant in many material particulars from defendant's understanding of the testimony, that it could serve no good purpose to challenge statement after statement throughout said entire so-called abstract, and moreover questions of fact, we apprehend, will be determined by your honors' reading and consideration of the testimony itself.

We submit that while it was perhaps not unnatural for complainant so to do, nevertheless throughout said abstract

she magnifies and states with great detail her own testimony, while minimizing and omitting material parts of the testimony of the defendant.

Further, some parts of said abstract might lead one to the conclusion that it was not prepared by any one familiar with the record or with the record before him.

To illustrate: On page 95 of said abstract appears the solemn and serious statement that one of the defendant's experts, C. B. McNabb, "is **not** a surveyor," when, if the abstractor had examined the very page of the record referred to and the succeeding pages, he would have discovered that Mr. McNabb is a surveyor of some thirty years' experience, has been the official county surveyor of Cocke County, Tennessee, for sixteen years, has surveyed the boundary between the States along the eastern boundary of GreeneCounty, Tennessee, except one tract, and has surveyed the boundary line southward from the Cataloochee turnpike—the beginning of the survey of 1821—to the fiftieth mile tree.

This witness gave a vivid description of the appearance of Hangover, the main mountain, to one going down the State line on the north side of the Tennessee River toward the river.

Rec., pp. 1525, 1526.

And instead of testifying that he had never done any blocking, as stated in said abstract on page 95, he modestly admitted that he had done blocking—perhaps not over twenty trees—and that he had carefully examined the marking on tree No. 30, which was claimed by Burns to be two hacks and a blaze, and he was satisfied that these marks were four hacks and that there was no blaze accompanying them.

Rec., pp. 1527, 1528.

It was the testimony of this witness, if any were needed, which showed that the map of 1821 could not be relied on in the matter of distances, because he testified that, in running the boundary line from the Cataloochee turnpike to the

fiftieth mile tree—which should have measured out fifty miles—he found the distance to be three and one-tenth miles over, and that this excess of distance was principally between Meigs boundary line, which crossed the State boundary line at thirty-one and a half miles, and said fiftieth mile tree. In other words, there was an excess of three and one-tenth miles in running eighteen and one-half miles.

Rec., pp. 1522, 1523.

The so-called Davenport Field Book (Rec., pp. 624-633) indicates that the commissioners were on this line from Cataloochee turnpike to the Georgia line only thirty-five days, inclusive of Sundays and other days, when, because of inclement weather, they could not work, and Mr. McNabb was of the opinion that this line could not have been run under from forty to fifty working days.

Rec., pp. 1529, 1530.

This witness was not even cross-examined on behalf of complainant, and now it is sought to destroy the effect of his testimony by stating that he was **not a surveyor.**

John L. Williams:

Equally subject to criticism is the abstract of the evidence given by John L. Williams.

Williams in his testimony discloses that fairness and candor which should always come from an honest witness.

On page 82 of said abstract it is stated that Williams testified or said: "If he were running up a creek, he would **not** note the creek," when in fact it is shown on the very page of the record cited in the abstract (Rec., p. 1417) that he answered directly to the contrary. The question was:

> "Q. 122. If you were going to do that and run up the stream five miles to a given point and then with the ridge to another point, **would you have noted that stream in your map and report?**
>
> "A. **Certainly.**"
>
> Record, p. 1417.

On page 81 of said abstract Williams is made to say that after he had sighted back to Parson's Bald and then turned the instrument and found that Fodderstack was to the right and Hangover to the left of his line of sight, "he then determined that the line was to the left after leaving Tennessee River," when he said that he "then examined the map and found that the map showed there was a turn to the left * * * at about the river."

Record, pp. 1408, 1409.

Said abstract omits all reference to the cogent reasons given by Mr. Williams for his reaching the conclusion and determining that Hangover is the main ridge. These reasons are set out on pages 1411 and 1412 of the printed record and will not be here repeated.

Said abstract omits all reference to Williams' explanation and testimony in relation to the beginning of the etchings or hachures on the map of 1821, set out on page 1414 of the record, as follows:

> "Q. 297. Look at this etching which is south of the river, as shown on this map, and on the west side of both the boundary line as laid down on the map and also of that stream marked 'Creek.' What does that etching or those hachures show?
>
> "A. That indicates to me that there was a ridge to the right of where they went up from the river or to the southwest, which would correspond to the actual conditions, going right across the river from the hemlock and up to the top of Hangover Ridge; that is, the Hangover Ridge goes right on down between the river and Slick Rock Creek to the mouth of Slick Rock Creek, going directly across the river from the hemlock to the top of the Hangover Ridge, the point of the main ridge is to the right or to the west of the line. So that would very well represent the actual conditions if they had gone right across the river from the hemlock and up to the top of that ridge."
>
> Record, p. 1414.

Further, Williams' testimony as to the Hangover, Fodderstack, and Little Fodderstack forming the watershed for Slick Rock Creek, and that the maker of the map of 1821 omitted all of this, if the stream marked "Creek" on said map was meant for Slick Rock Creek, as set out on pages 1418 and 1419 of the printed record.

Further, Williams' comparison of elevations along the Hangover Mountain and the Fodderstack Ridge, as set out on pages 1420 and 1421 of the printed record, are not even referred to.

On page 82 of the abstract he is made to say that he thinks the commissioners went over Hangover **because** it is the most direct way, when that is only one of the reasons given by him, and he states that he would have gone to the Hangover Ridge in the most direct way and then along Hangover Ridge over Hangover.

Record, p. 1424.

Further, said abstract makes no reference to Williams' testimony to the effect that in going directly across the Tennessee River from the marked fore-and-aft hemlock along and over Hangover would comply with the commissioners' report and the confirmatory acts of both States, and that following Burns' line up Slick Rock Creek would not so comply, which testimony is set out on pages 1425-1428 of the printed record.

Further, said abstract omits all reference to the testimony of this expert witness as to the meaning of the call contained in the report of the Commissioners "from the Tennessee River to the main ridge," which testimony is as follows: "I understand that it means to go to the main ridge, directly to the main ridge as the closest place" (Record, p. 1433), and this is just what the Court of Appeals at Cincinnati construed said call to mean (103 Fed., p. 542).

Said abstract on page 83 misconstrues Williams' testimony in relation to State line trees on Hangover. He did not

say he never found any State line trees that he was satisfied were such, but rather that he did not find any marks that he thought were the originals; that the sourwood was so decayed he could not count the age (Rec., p. 1434).

And it is to be borne in mind that this sourwood had been blocked some fourteen years prior to Williams' testimony and the block taken into the Circuit Court of the United States at Knoxville in the case of Hebard *vs.* Belding.

On page 84, in referring to tree No. 30, Williams' testimony in relation to what was found by the blocking of said tree, as set out on pages 1441-1444 of the printed record, is omitted. And on page 85 of said abstract there is no reference to Williams' testimony that a good surveyor would have shown in his report or on his map the crossing or following of any stream in the course of his survey, which testimony is found on page 1458 of the printed record.

On page 85 of said abstract Williams is made to say that "the Slick Rock Creek is inaccurately located," when he only answered "yes" to the question: "If that stream marked 'Creek' on that map of 1821 is Slick Rock, you know, don't you, that it is inaccurately located?" Williams never stated that Slick Rock Creek is shown on the map of 1821.

Further on page 85 he is made to state that "no other stream than Slick Rock comes in there," when his answer on cross-examination was referring to streams west of the boundary line and the questions were predicated upon Burns' map and calling witness' attention to the locality half a mile below where the line crossed to go over Hangover.

Rec., p. 1460.

All reference to his testimony on page 1463 of the printed record, to the effect that Fodderstack Ridge does not keep up to its general average as well or better than Hangover, is omitted.

On page 85 of said abstract he is made to say that Cheoah is about at right angles to Slick Rock and at an angle of 60°

or 63° to Hangover, but he makes no such statement as to the actual location of Cheoah, and his answer is predicated upon what is shown by the Burns map, to which his attention was called in the question to elicit the answers referred to.

Rec., p. 1464.

On pages 85 and 86 we respectfully insist the abstract omits Williams' testimony in relation to his reasons for believing Hangover to be the main ridge, his testimony in relation thereto appearing on page 1465 of the printed record.

The abstract on page 86 omits Williams' detailed testimony of the marks on tree No. 30, as set out on page 1471 of the printed record.

On page 87 of the abstract, quoting from the printed record, page 1477, Williams is made to say: "If he was absolutely sure of State line marks on Slick Rock Creek, they would control him," when he made no such statement, and his testimony, to be properly understood, must be read in connection with the questions and answers which precede and follow the answer from which said statement on page 87 of the abstract was **misquoted.**

All reference to Williams' construction of the map of 1821 as sustaining the Tennessee contention in the Tellico territory is omitted. This testimony is found on pages 1485 and 1486 of the printed record.

All reference is omitted to his testiomny that, although he was looking for State line marks, he found no such tree as is described by Chambers west of tree No. 29 and between it and tree No. 30 (see Rec., p. 1487).

On page 91 of said abstract, apparently purporting to quote from page 1621, Williams is made to say: "I think that by very careful work **the** field-notes could be made from the map itself, which would make another map which would very closely resemble it." The article "the" is interpolated into Williams' answer to question 415; he did not say that

the field-notes—that is, the Davenport field-notes—could have been made from said map, but he expressly stated that it was not his opinion that the map of 1821 was made from the Davenport field-notes.

Rec., p. 1621.

O. L. Muller:

The abstract of the testimony of this witness does not fairly express much of the important testimony given by him. To illustrate: On page 92 there is a mere statement, referring to page 1370 of the record, that he found marked trees along the line on Hangover, and mentions the sourwood. This is not only true, but in view of complainant's reiterated statement that there was no evidence showing trees bearing State-line marks along Hangover, it would have been but fair to have made some reference, however slight, to Muller's description of the State-line marks found on three different trees along Hangover, and also his testimony describing the condition of these trees. This testimony was given in 1896—is positive and intelligent, carrying conviction with it.

On page 93 of the abstract Muller is made to state that "in his opinion the Unicoi is the highest ridge," when Muller was expressing his opinion that the mountain both north and south of Hangover is called the "Unicoi Range," and that this is the **highest range**. There can be no doubt about this.

Rec., pp. 1277-1278.

On page 93 of the abstract it is stated that Muller testified that the map shows that the line crossed "**at** a water-course," when he says nothing of the kind; his whole testimony contradicts the tenor of the questions being put to him and the positive statement made on page 93 of the abstract; what he did say was in substance that the map shows that the line crossed "**close**" to a water-course, and that it followed the

course of the mountain; that it crossed the Tennessee River when it struck it, and then run along Hangover Ridge and the main dividing ridge around and to the east of the headwaters of Tellico River, and he reiterates his statement that the line crossed the river directly from the fore-and-aft tree to the bank on the south side, which was very "steep and bluffy."

Rec., pp. 1281-1282, 1285, 1307.

J. K. Wilson:

The abstract of the important and material testimony of James K. Wilson, found on page 94 of complainant's so-called abstract, is a travesty and utterly worthless for any purpose. The clear, concise, and intelligent statement of what this witness, who was examined in 1897, found in his survey of the State line along the Hangover Ridge, and especially his testimony in relation to the marked trees along that line, are to be found on pages 1347, 1348, 1349, and 1350 of the printed record, and we submit to your honors that a mere reading of that testimony carries conviction that Wilson was right in his location of the line along Hangover Ridge. The judge of the Circuit Court believed him and the Court of Appeals at Cincinnati gave him credit.

H. M. Kent:

The abstract of the testimony of this witness, as found on pages 94 and 95 complainant's abstract, cannot be at all helpful to any court, because so much is omitted, but we submit that while complainant was referring to the opinion given by Mr. Kent he should have been accorded the justice of having his opinion set out, as he did in his testimony found on page 1510 of the record, as follows:

> "That in coming to the hemlock my conclusion was it would follow the main ridge, and I considered the Hangover the main ridge, and it would go down that

way is my impression about it, and I must have reported that, but that is what I found and I reported what I found in the way of trees in detail."

We have thus shown that this so-called abstract and analysis of evidence cannot be relied on, because it sometimes misconstrues a statement, sometimes misstates the testimony, and sometimes puts in the mouth of the witness just the contrary of what he did say. Some of these misstatements, misconstructions, and interpolations we have pointed out; whether these were inadvertent errors, it is not material to inquire.

The result is the same—they show that the abstract cannot be relied upon and that the court must go to the record.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.
CHARLES T. CATES, JR.,
Solicitor for Defendant.

T. E. H. McCROSKEY,
SAMUEL G. SHIELDS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

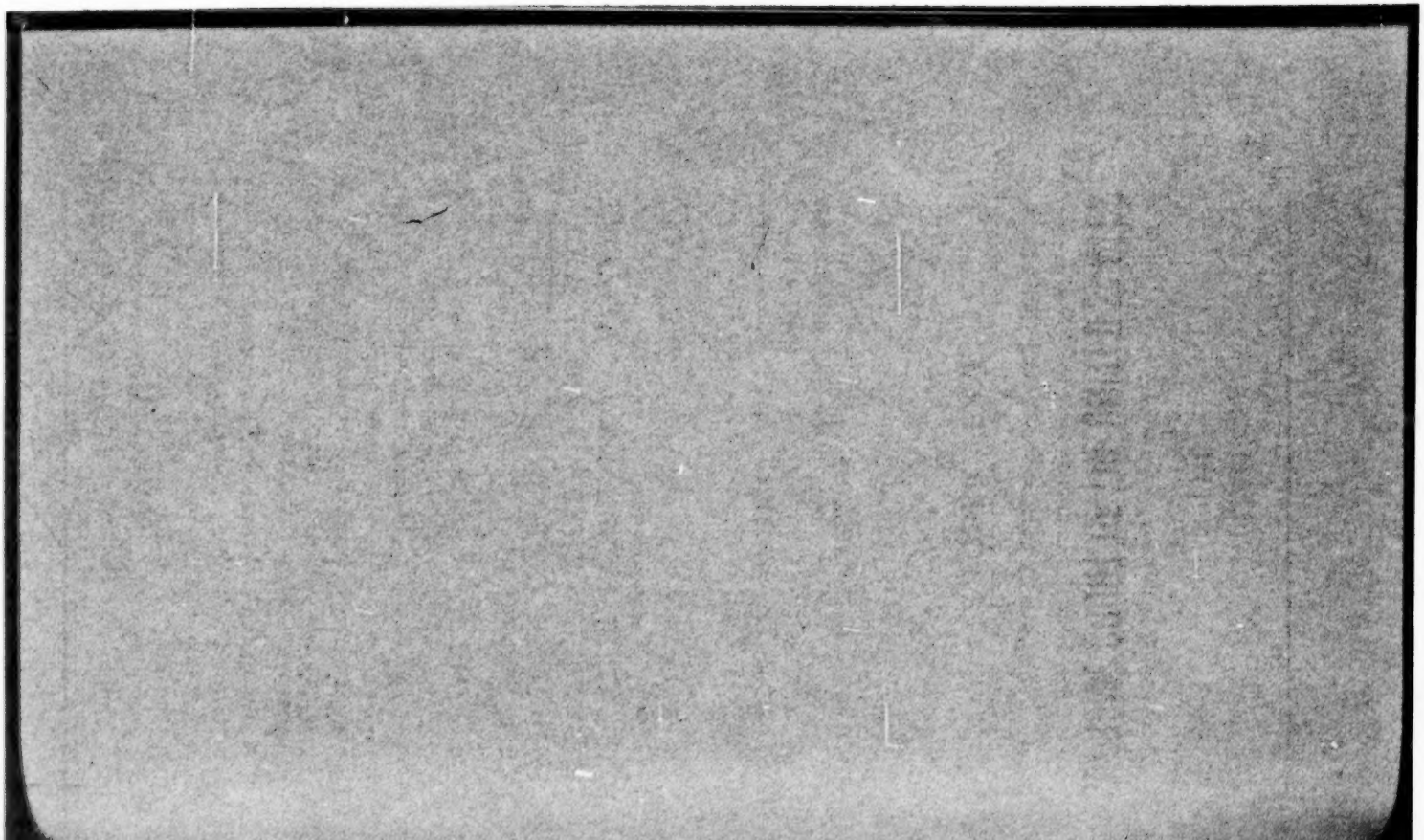
STATE OF NORTH CAROLINA
vs.
STATE OF TENNESSEE

No. 4, Original
In Equity

BRIEF FILED IN BEHALF OF THEODORE COBB AND OTHERS, OWNERS AND HOLDERS OF THE STOCK IN THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY.

W. D. Spears
L. N. Spears,
Solicitors for Theodore Cobb, et al.

MACGOWAN-COOKE, CHATTANOOGA



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Belle v. Hickman, 25 Tenn. (Humph.) 397.
M'Iver v. Walker, 9 Cranch., 173, L. Ed. 694.
43 C. C. A., 303.
Hebard v. Belding, 103 Fed. Rep. 532.

10. CONTENTION OF NORTH CAROLINA.

North Carolina invokes the principle that lines run and marked at the time of the original surveys, upon which a grant is issued, if found, constitutes the true boundary.

Cook v. Brunley, 11 Wallace, 659.
M'Iver v. Walker, 9 Cranch, 173.
Clement v. Parker, 125 U. S., 109. ---------- 84-85

But in order to make a marked line controlling, it must be identified.

Shenooweth v. Harper, 3 Peters, 92 L. Ed., 614.
Phagan v. Stoner, 67 Texas, 286.

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Elliott v. Jefferson, 133 N. C., 207, reported in 64 L. R. A., 135.
Massingale v. Boiles, 4 Humph., (Tenn.) 205.
Martin v. Nance, 3 HeHad, (Tenn.) 205.
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Belding v. Hebard, 43 C. C. A., 303, reported in Fed. Rep., 532.
Phagan v. Stoner, 67 Texas, 288.
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Williamson v. Buchanan, 2 Yea., 278.
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Hunnicutt v. Peyton, 102 U. S., 2636, 26 L. Ed., 119.
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Bishop v. Arnold, Tenn., 366.
Staub v. Hampton, 7 Cates, (Tenn.) 725.
Read v. Prop. Locks & Canals, 8 Howard U. S., 287, 12 L. Ed., 1077.
Boardman v. Reed & Ford, 6 Peters, 325, 8 L. Ed., 422.
Lowndes v. Hightower, 153 U. S., 191, 38 L. Ed. 619. ---------- ---
State v. Nashville, 2 Cooper Chancery Reports, 75.
Johnson v. Kellogg, 7 Heisk., 262. -------- 110-112

18. ESTOPPEL.
Hebard v. Belding, 43 C. C. A., 303, 103 Fed. Rep., 532.
Virginia v. Tennessee, 138 U. S., 503, 37 L. Ed. 537.
Bartlett Lumber Co. v. Saunders, 103 U. S., 316, 28 L. Ed., 549. ---------- 113

19. But, if the line as insisted upon by North Carolina had ben run and marked by the Commissioners as the State line, under the facts of this case, it would not be binding upon the State of Tennessee.
Schrader Mining & Mfg. Co. v. Packer, 129 U. S., 512, 32 L. Ed., 764.
Higuera's Heirs v. United States, 72 U. S., 827, 18 L. Ed., 471.
Ayer v. Watson, 113 U. S., 594, 28 L. Ed., 1097. ---------- 123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

STATE OF NORTH CAROLINA vs. STATE OF TENNESSEE	No. 4, Original In Equity

TO THE HONORABLE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

May it please the Court:

This brief is filed in the interest of Theodore Cobb and others, owners and holders of the stock in the Smoky Mountain Land, Lumber & Improvement Company.

Prior to 1895, Chas. Hebard claimed to own a tract of land situated in Munroe County, in the State of Tennessee, west of and adjacent to the land now in controversy in this suit (Record p. 1362.) Hebard claimed that David W. Belding and others were then setting up a claim to the land under grants issued by the State of North Carolina and were at that time trespassing upon same; filed a bill to restrain trespasses and remove defendant's claim as a cloud upon the title

to said tract of land. in the Chancery Court of Munroe County, Tennessee, and to have his title to said land set up and established.

The case was removed to the United States Court for the Northern Division of the Eastern District of Tennessee. While this case was pending in said Court, the plaintiff, Chas. Hebard, acquired by purchase from T. E. H. McCrosky and A. M. McCrosky, the land embraced in Grant No. 8970, issued by the State of Tennessee to them on May 14th, 1892, based upon an entry made in Munroe County, Tennessee, on July 28th, 1893, and embraces 5000 acres, more or less, described as:—

> "Lying in Munroe County, Tennessee, in the Ocoee District, beginning at the mouth of Slick Rock Creek where it empties into the Tennessee River, thence up Slick Rock Creek with the line of White and Bearden land to the point where said White and Bearden line leaves the creek, thence following the White and Bearden line to where it intersects the North Carolina line, thence to the river and down same to the beginning." (Record p. 1156.)

Thereupon the said Chas. Hebard filed a bill in equity in the Circuit Court of the United States in and for the Northern Division of the Eastern District of Tennessee against the D. W. Belding, Henry Stick, Nathan Stick, Louis Kron, D. W. Hyman, May Bragg, R. L. Cooper, J. W. Cooper, and R. M. Archer, alleging title to something like 40,000 acres of land by virtue of grant issued by the State of Tennessee and interme-

diate conveyances from the State of Tennessee to himself. This bill embraced all the land mentioned and described in the original bill in Munroe County, Tennessee, as well as the land acquired by Hebard from the two McCroskys, as above recited.

In this bill it was alleged that the defendants were trespassing on said land, were cutting and removing the timber therefrom and otherwise committing waste thereon and asked that this trespass be enjoined and that the claims of the defendant be removed as clouds from complainant's title.

The defendants, in their answer, claimed to own the land in controversy by virtue of grants issued by the State of North Carolina which had come to them by intermediate conveyances. The title to the land turned upon the location of the boundary line between the State of North Carolina and the State of Tennessee, and the object of the bill was incidentally to have the State line ascertained and determined between the Little Tennessee River and the Mountain Peak called Stratton Bald, a distance of seven or eight miles from where the State line crosses the Little Tennessee River, as it was evident that the title depended upon which State had power and jurisdiction to issue the grants. Hebard claimed the land was situated in the State of Tennessee, while the defendant insisted that it was situated in the State of North Carolina. Hence, to ascertain the title, it became necessary to locate the State line, as above stated. Now, the State of Tennessee contended that the line crossed the Tennessee River at a spruce pine situated on the north bank

of said river, to the bluff of the Hangover lead, ascending the lead to the crest, ran along the crest of the ridge to the point where the Fodderstack lead joins it, at a point known in the record as the "Junction" commonly called Stratton Bald.

On the other hand, the State of North Carolina insisted that when the line reached the Tennessee River at the spruce pine, which is conceded to be a fore and aft tree in the said line, situated on the north bank of the river, it turned to the Northwest and followed the north bank of the Tennessee River for something like a half a mile to a point opposite the mouth of Slick Rock Creek (a creek which rises back in the mountains and runs in a westerly direction to where it empties into the Tennessee River,) and then proceeds up the Slick Rock Creek opposite a spur of the Fodderstack, then up this spur to the crest of the Fodderstack, thence along the crest to a point called the "junction' or Stratton Bald.

There are 6,600 acres of land between these lines the title to which is in litigation in said case. That case was heard upon its merits by the Honorable C. D. Clarke, District Judge, who found the equities and merits of the case to be with plaintiff, Hebard; decreed that the proper location of the state line was as insisted upon by the State of Tennessee, gave plaintiff full relief, perpetually enjoining the defendants from committing waste, removing their claim under the North Carolina grants as a cloud on Hebard's title to the land. From this decree an appeal was taken to the United States Circuit Court of Appeals for the Sixth District at Cincinnati, and

the case was heard by that Court on March 14, 1900, wherein a decree was rendered, in which the decree of the Circuit Court was, in all things, confirmed. The opinion of the Circuit Court of Appeals was delivered by the late Judge Lurton and is reported in 103 Fed. Rep. 532.

After the final decree in the Circuit Court of Appeals was entered, the rights of all the parties determined, on August 6th, 1907, William R. Hopkins and others claimed that pending the litigation involving the title to said land that he and those associated with him had purchased and had conveyed to them and had succeeded to all the title, rights and equities of Belding and others to the land involved, alleged that they were very much aggrieved by the decree of the Circuit Court, and the affirmance thereof in the Court of Appeals, and asked leave to file a bill of Review and to have said decrees reviewed and reversed. This bill of review was based upon the allegation that since the determination of this case in the Circuit Court of Appeals, the petitioners in the bill of review had discovered a map which was made by the commissioners who ran the line between the State of North Carolina and the State of Tennessee in 1821, and that the said line as laid down upon this map was in exact accord with the contention of the State of North Carolina, that the line when it reached the river ran down the river for about a half a mile and then across the river at the mouth of Slick Rock Creek, thence ran up the creek to a spur of the Fodderstack, and thence around as claimed to the "junction" or Stratton Bald. This petition, accompanied with the pro-

posed bill of review, was presented to Judge Clarke of the District Court, who thereupon directed notice to be served upos the Smoky Mountain Lumber Company and others to show cause why it should not be filed. Such proceedings were had in this case, that Judge Clarke permitted the bill of review to be filed, subject to all legal objections, by demurrer, answer, plea, or otherwise.

The bill of review alleged the death of Chas. Hebard and made his heirs and assigns, the Smokey Mountain Lumber Company and others, the then owners of the land, defendants. Answers and replications were filed, and all the evidence filed. When the case was heard before the Honorable John E. McCall, District Judge, sitting in place of Judge Clarke, he entered a decree on July 5th, 1909, dismissing the bill of review. From this decree William R. Hopkins and others, plaintiffs in the bill of review, appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati where on October 11th, 1911, Knappen, Circuit Judge, delivered the opinion of the Court, in which he affirmed the decree of Judge McCall in all respects, dismissing the bill of review. In the opinion delivered by Judge Knappen, he set out in full the opinion of Judge McCall, and the case is reported in 194 Fed. Rep. 301.

In the meanwhile, the State of North Carolina brought this original suit in this Court against the State of Tennessee, to have that part of the boundary lines between the two states located and settled, beginning at a point a short distance north of the Tennessee River, thence in a south-

west direction to the place called Unaka or Unicoi Mountains. After this suit was brought, W. R. Hopkins and others instituted proceedings, and brought the suit of Hopkins and others against Belding and others to this court where the same is now pending.

On or about April 24th, 1909, the Babcock Lumber and Land Company filed a petition in this court, in this case (North Carolina against Tennessee) setting forth the facts substantially as above recited, and alleged that the line claimed to be in dispute between the State of North Carolina and the State of Tennessee is the same identical line settled and established in the suit of Chas. Hebard against David W. Belding and others, in the Circuit Court of Appeals for the Sixth Circuit, on July 13th, 1900; and further alleging that the petitioners, that is the Babcock Lumber and Land Company, were the present owners of the land in dispute between the State of North Carolina and the State of Tennessee, that they purchased said land after the decree was entered in the Circuit Court of Appeals, that they were vitally interested in the outcome of this suit because if the decree in this case should be different from the decree of the United States Circuit Court of Appeals, it would put a cloud upon their title, if not seriously affect and destroy it. This seems to be the effect of the holding in the case of State of Iowa against the State of Illinois, 151 U. S., 237; 38 L. Ed. 143, where it is held that in the determination of the boundary lines between sovereign states this court proceeds only upon the utmost circumspection and deliberation and no order can

stand in respect to which full opportunity to be heard has not been afforded, and where the report of the Commissioners to fix the boundary lines between the States has been as to a portion of the boundary confirmed by this court, the order of confirmation will be vacated if it was made without notice to one of the states, etc. Evidently, the court had in mind this holding, when on May 11th, 1909, it entered the following order:

> "On consideration of the motion of the Babcock Lumber and Land Company for leave to intervene herein, it is now and here ordered by the Court that said motion be and the same is hereby denied; but leave is hereby granted to the Counsel for said company to file printed briefs herein as *amicus curiae*."

The Babcock Lumber & Land Company purchased the land in the Slick Rock Basin east of the Fodderstack and west of the Hangover Range, it being the land involved in this case, from the Smoky Mountain Land, Lumber & Improvement Company, in this way:

On the 29th of December, 1906, E. B. Babcocks contracted to purchase this property and other property comprising 42,000 acres of land from the Smoky Mountain Land, Lumber & Improvement Company. The consideration was $900,000,00. Twenty-five Thousand Dollars was paid in cash at the time, and $575,000.00 has since been paid, leaving a balance of $300,000.-00 still unpaid to the Smoky Mountain Land, Lumber & Improvement Company.

In the contract with Babcock, the suit of Hebard against Belding and others is referred to, and it was conceded that that suit cast a cloud upon the title to that part of the propery mentioned in the contract between Fodderstack range on the west and the Hangover Range on the east, and situated in Slick Rock Basin, estimated to contain something like 10,000 acres.

It was also recognized in that contract that there might be some other small portions of the land mentioned in the contract covered by other titles. It was then further agreed that any part of the land that might be lost by reason of superior title, should be valued at the rate of $35.00 per acre, and the sum deducted from the $300,000.00, and only the balance of the $300,000.00 should be paid by Babcock to the Smoky Mountain Land, Lumber & Improvement Company.

Babcock, after this contract was made, or at the time it was made, assigned it to the Babcock Lumber & Land Company, and now this last company claims to be the equitable owner of this property.

From a recitation of these facts, it is apparent that the Smoky Mountain Land, Lumber & Improvement Company, one of the defendants to the bill of review hereinbefore mentioned, is vitally interested in this litigation.

William Cobb, Theodore Cobb and others are the directors and stockholders of the Smoky Mountain Land, Lumber & Improvement Company, and this brief is filed on behalf of said company and said stockholders.

PLEADINGS

The original bill in this case was filed in this Court by the State of North Carolina against the State of Tennessee, which, after setting forth the authority for the bringing of the suit, alleged that the boundary between the State of North Carolina and the State of Tennessee is disputed and in controversy insofar as the same is hereinafter set out; and that the State of Tennessee has lately been making grants of the land within the disputed territory and exercising sovereignty and jurisdiction thereover and interferring with the sovereignty of the State of North Carolina; and that the State of North Carolina had undisputed exercise of this sovereignty and jurisdiction over the land in said disputed territory, which sovereignty and jurisdiction of the said State of North Carolina was up to the year 1892, exercised without let, hindrance or controversy.

The bill then set out in detail the facts relating to the cession of the land by the State of North Carolina west of the Allegheny Mountain to the Government of the United States. This territory so ceded was organized into a state, now the State of Tennessee, and admitted into the Union as one of the United States of America.

That joint commissions were appointed by the two states in 1796 to run and mark the lines separating the State of Tennessee from the State of North Carolina according to this cession act. That these commissioners marked and settled the line from the northeast, or the Virginia line, to a point on the Great Smokey Mountains west

of Pigeon River, marked by a stone set up on the north side of Cattalouchee Turnpike road; but for some reason the line was not run and marked between the Cattalouchee Turnpike road and the Georgia line.

That afterwards, about 1819, the general assembly of the State of North Carolina passed an act which is set out in full in the bill, the object of which was stated to be "to accurately run, distinctly mark and permanently establish the boundary line between the State of North Carolina and the State of Tennessee from the point where the former commissioners stopped to the western terminus."

That about the same time the State of Tennessee passed a similar act and appointed commissioners, "to accurately run and distinctly mark and permanently establish this boundary line between the two states from the Cattalouchee Turnpike road to the Georgia line."

That said commissioners met, jointly ran and marked the line, and that they made written reports to their respective states, which reports were, by the respective general assemblies of said states, adopted and confirmed in 1821; and that ever since the States of North Carolina and Tennessee have exercised jurisdiction and sovereignty in all respects, have made surveys and issued grants to land in accordance with the said line as located by said commissioners, and have recognized the said line as the true line.

The bill then alleges that the boundary line between the State of North Carolina and the State of Tennessee may be generally described as following the main ridge or watershed of the

Allegheny Mountain Range, which has many local names, such as Great Iron and Smoky Mountains, and the Unaka or Unicoi Mountain; that between the extreme heights of the Great Iron or Smoky Mountains and the main ridge of the Unaka or Unicoi Mountains, the Tennessee River breaks through the mountains in a northwest course and a part of the said line which extends over the extreme height of the Great Smoky Mountains of the Tennessee River, crossing the river ascends to the main ridge of the Unaka or Unicoi Mountains, has fallen into dispute.

The bill then states that the line between these points descends from the extreme height of the Mountains northwestwardly to the river, crosses the river at a point on the southwest bank thereof, thence west to the mouth of a stream known as Slick Rock Creek, follows the creek about five miles to a lead leading up the main ridge, follows said ridge up to the summit of what is known as the Big Fodderstack Mountain, and then follows the main ridge to the junction of the Big Fodderstack and then follows the main ridge to the Unaka Mountains southwestwardly.

The bill then states that up to the year 1892, the line as above described, was admitted to be the true line; that the State of Tennessee recognized this line in the year 1835, when it laid out the Ocoee District, and fixed this line as the eastern boundary of said district, and of its County of Munroe.

That after the removal of the Cherokee Indians from this territory, the State of North Carolina, in the year 1853, opened these lands to its citizens for Entry, and thereafter issued a large number of grants running to said line

as the State line, collecting taxes on all of the lands up to said line.

That in the year 1892, the State of Tennessee granted the land to T. E. H. and H. M. McCroskey, lying between the line as claimed by North Corolina and the line as claimed by the State of Tennessee.

That controversies have arisen over the title to this land by parties claiming under the grants issued by the State of North Carolina, (referring of course, to the suit of Hebard against Belding and others) and the State of Tennessee,

That diligent and earnest searches were made both at Nashville, Tennessee, and at Raleigh, North Carolina, for the field notes, maps and reports of said commissioners, but could not be found until about the year 1903, when the reports and maps of the commissioners were found at Nashville, Tennessee, and that said reports and maps show said line to be where the State of North Carolina has always claimed it to be; but that the State of Tennessee refuses to recognize said line and is now claiming the true line to be eastwardly of said line, taking a part of the territory of the State of North Carolina, about three miles wide, and about ten miles long. The prayer of the bill is for a decree locating the lines in accordance with the contention of North Carolina. (Record pp. 2 to 8.)

On the 9th day of June, 1909, the State of North Carolina filed an amended bill making substantially the same allegations as it made in the original bill. The only material difference between the original and amended bills, the amended bill extends and lengthens that part of

the line in dispute, which is described in the amended bill as follows:

> "The line descends from the extreme height of the mountain to the river, crosses the river to a point in the southwest bank thereof, just west of a stream known as Slick Rock Creek, follows the creek a short distance to a ridge leading up to the main ridge follows said ridge up to the summit known as Big Fodderstack Mountain, follows the main ridge thence to the junction of the Big Fodderstack and Hangover Lead, thence follows the main ridge to the Unaka Mountains southwestwardly."

The amended bill then sets out the contention of the State of Tennessee in the following language: (referring to the State of Tennessee).

> "Claims a line to the eastward of the true line, taking a part of the State of North Carolina about twenty miles long and three and a half miles wide at its widest part and continues to exercise jurisdiction, demand taxes," etc.

The bill then asks that upon final hearing that the boundary herein ascertained be established by decree of the court, etc. (Record pp. 24 to 30.)

At the October term of this court, in 1909, the State of Tennessee filed its answer to the original and amended bills of plaintiff, exhibited against it by the State of North Carolina, and asked that it also be considered to have the effect of a cross bill.

It alleges that the territory now belonging to the State of Tennessee, and over which she exer-

cises and has a right to exercise jurisdiction, was formerly a part of the plaintiff, the State of North Carolina, and was ceded by the plaintiff to the United States in 1789 by an act of the General Assembly of Plaintiff, entitled "An Act for the purpose of ceding to the United States of America certain western lands therein described." Said territory so ceded, now the State of Tennessee, being described in said cession act, then follows a description of the land ceded as set out in the session act.

It is then alleged that the deed executed by plaintiff carrying into effect said cession act was dated the 25th day of February, 1790, and was accepted by an act of Congress entitled an act to accept a cession of the claims of North Carolina to certain districts of territory, passed and approved on the 2nd day of April 1790; that on the 6th day of February, 1796, the people of the territory so ceded to the United States, through their representatives, organized the defendant, State of Tennessee, and ordained and established a Constitution wherein (this is the declaration of rights, Section 32) the boundaries of the defendant, State of Tennessee, was described as set out in said act of cession, and declared to be as follows: Then follows a description of the ceded territory in all respects the same as the cession act.

It is then alleged that the State of Tennessee was admitted into the Union and became one of the United States on June 1, 1796.

It then states it was also true that in the year 1796 the General Assembly of the State of North Carolina passed an act appointing commis-

sioners to fix and permanently establish the boundary line between the State of North Carolina and the State of Tennessee, and the same to mark and ascertain as distinctly as possible, *agreeably to the true intent and meaning of the cession act ceding to the United States of America certain western land therein described.*

Commissioners were named, and said commissioners, about the year 1799, did run and mark the western part of the western boundary of the plaintiff to a point on the north side of Cattalouchee Turnpike road, leaving the remainder of the line to the southern boundary of the State unmarked and unsettled.

It is further alleged that the plaintiff, by an act of the General Assembly, passed in 1899, Revised Statutes of North Carolina, 1837, Vol. 2, page 94, provided for the appointment of three commissioners to meet with the commissioners appointed by the State of Tennessee, to settle, run and mark the boundary line between said states, agreeably to the true intent and meaning of the act of the General Assembly of North Carolina entitled "An Act for the purpose of ceding to the United States of America certain western lands therein described, beginning at a point where the line treminates, which was run in 1799 by the former commissioners, as hereinbefore recited."

And, that thereafter, July 20th, 1820, the General Assembly of the State of Tennessee passed an act which provided for the appointment of commissioners to meet with the North Carolina Commissioners and with them to settle, run and remark the boundary line between the

State of Tennessee and the State of North Carolina, agreeably to the true intent and meaning of the said act of the General Assembly of North Carolina, entitled "An Act for the purpose of ceding to the United States certain western lands therein described" commonly called the cession act.

It is then alleged that under the authority of said act the State of North Carolina appointed Joseph Mebane, M. Stokes and R. Love, Commissioners, and the State of Tennessee appointed A. Smith, Isaac Allen and Simeon Perry, and that said commissioners were charged with the duty of settling and running the line between the two states, *agreeably to the true intent and meaning of the cession act.*

That said commissioners ran and marked the boundary between the two states from the Cattalouchee Turnpike road to the southern boundary of both states, and made and filed with each state a report of said survey, accompanying the same with a map. The report of the commissioners was duly affirmed, approved and ratified by the legislatures of both states in 1821. The confirmatory act on the part of the State of Tennessee was passed and approved on November 9th, 1821, in Chapter 35 of the Acts of 1821, which is set out and fully described in the answer and cross bill. The confirmatory Act of North Carolina, entitled "An Act to confirm the boundary line between this state and the state of Tennessee, and for other purposes," will be found in Revised Statutes of North Carolina for 1837, on Page 96.

The confirmatory acts of North Carolina and

Tennessee describe the boundary line between the two states in identical terms. That part of the line in controversy is described in the following language:

> "From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called Unicoi or Unaka Mountains."

The answer then proceeds (Record p. 40):

> "The defendant avers that said boundary line, as described in the Cession Act of 1789, and ran by the commissioners in 1821, crossed directly over the Tennessee River from the fore and aft tree (a spruce pine on the north bank of the river conceded to be in the State line) to the crest of the main ridge of the mountain, which is known as to the Hangover Ridge or lead, thence ran northeast to the river, lowering somewhat as it approaches the river, where it ends or terminates in a bluff directly opposite said fore and aft tree, thence along and across said Hangover Ridge and the lead of Stratton Bald to the junction of Hangover and Fodderstack."

The answer then proceeds, and asserts, that prior to 1892, it exercised jurisdiction over the land west of the line above described, and between that line and the line claimed to be the true line by the State of North Carolina, which crossed the river at the mouth of Slick Rock Creek, then ran up the creek to a spur of the Fodderstack, then up said spur across the Foddorstack, and thence along the crest of the Fod-

derstack to the junction of the Fodderstack and Hangover.

It alleges that immediately after the Indian title to said land was extinguished, about the year 1836, the State of Tennessee established a surveyor's district known as the Ocoee District, and directed that the land be surveyed and returned. Said surveys proceeded, and they surveyed the section of land now in dispute around the headwaters of the Tellico River, but for some reason did not lay off into sections the land between Slick Rock Creek and Hangover Ridge, and in about the year 1836, the State of Tennessee issued grants for all that land so laid off into sections around the headwaters of Tellico River, and afterwards in 1854, Tennessee, on being informed that all the land in the Ocoee District to which the Indian title had been extinguished, had not been sectionized, passed an act opening the remainder of the unsectionized part of said land in Ocoee District to general entry and grant, but so wild and unpenetrable was that part of the country between Slick Rock Creek and Hangover Ridge that no entries were made there until in 1882 or 1883. In 1883 these lands were entered in conformity to the laws of Tennessee, and granted as follows:

Grant to Samuel J. Griffiths and Joseph H. Morton, in 1886 by Grant No. 41,091; that in 1882 T. E. H. McCrosky and A. M. McCrosky entered the same land which was granted to them in 1892, Grant No. 8,970.

It is then alleged that both Morton and Griffiths and T. E. H. and A. H. McCrosky, through their tenants, took possession of said land be-

tween Slick Rock Creek and Hangover Ridge, that said land was assessed for taxation in Tennessee, that persons living on said land exercised by voting and otherwise the rights of citizens of Tennessee and that the title of the said McCrosky passed to Chas. Hebard, and that his possession being interferred with by D. W. Belding and others, claiming said land under grant issued by the State of North Carolina, Hebard filed a bill in the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee against the said Belding and others to recover said land, and that Belding and others answered said bill as hereinbefore recited and insisted that the boundary line from Tennessee River to the junction of Fodderstack and Hangover Ridge has been judicially decided to be along the crest of the Hangover Ridge, which at that place is the main ridge of the mountains, both by the courts of Tennessee and the courts of the United States.

The prayer of the cross bill is that the boundary line between North Carolina and Tennessee, from about one mile northeast of the Tennessee River southwardly to the Unaka Turnpike road be ascertained and declared as prayed for by your orators and as contended for by the State of Tennessee, as hereinbefore recited. (Rcord pp. 33 to 47.)

The State of North Carolina filed an answer to this cross bill. In this answer all the facts set out in the original and amended bill are restated and affirmed and the same relief insisted upon as insisted upon and prayed for in the original and amended bill. Record pp. 55 to 60.)

THE ISSUES.

The evidence in the case is very full, illustrating every phase of the controversy. The pleadings put in contest all that part of the said line between the two states from a point about one mile north of the Tennessee River southwestwardly to the Unaka Turnpike road, or from the 64th Mile Tree to the 101st Mile Tree, as shown on the map made by the report of the commissioners in 1821, exhibited to defendant's answer and cross bill.

Under the evidence, this line is divided into five sections only two of these sections are now in controversy. The line from about one mile north of the Tennessee River down to the spruce pine marked as a fore and aft tree standing on and near the bank of the river. This part of the line is marked and is now conceded to be properly located, and the spruce pine is conceded to be a fore and aft tree in the line between the states.

The line from Stratton Bald, or the junction of the Fodderstack lead with the Hangover lead, southwest to a point known in the record as the junction of the State Ridge with the main ridge, called in the record the divide, a distance of some seven or eight miles, is conceded to be correctly located.

From the junction of the Jenks Ridge with the main ridge known as the divide or watershed ridge to the Unaka Turnpike road, it is conceded the line is correctly located.

There are only two sections of the line in dispute.

First, from the spruce pine standing on the northeast bank of the Tennessee River to Strat-

ton Bald or junction of the Fodderstack Range with the main range called the Hangover lead, a distance of some ten miles is in controversy.

Second, from the junction of the State ridge with the main ridge, called the watershed (south of a point called Laurel Top), to the junction of Jenks Ridge with the main ridge southwest of the Tellico River, a distance of about six miles, is in controversy.

The true line dividing the State of Tennessee from the State of North Carolina is fully set out and described in the Cession Act and is in the following language:

> "All right, title and claim which this state has to the sovereignty and territory of the land situated within the chartered limits of this state west of a line beginning on the extreme heights of the Stone Mountain at a place where the Virginia line intersects it, running thence along the extreme heights of that mountain to the place where the Wautaga River breaks through it; thence a direct course to the top of the Yellow Mountain where Bright's road crosses the same; thence along a ridge of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; thence along the extreme heights of the said mountain to where Nollichucky River runs through the same; thence to the top of the Bald Mountain; thence along the extreme heights of said mountain to the painted rock on the French Broad River; thence along the highest ridge of the said mountains to

the place where it is called the Great Iron or Smoky Mountains; thence along the extreme heights of said mountains to the place where it is called Unicoi or Unaka Mountains between the Indian towns of Cowee and old Chota; thence along the main ridge of the said mountains to the southern boundary of the State."

It is also described in the Constitution of the State of Tennessee in the following language:

"Beginning on the extreme heights of the Stone Mountains at a place where the Virginia line intersects in latitude 36 degrees and 30 minutes north, running thence along the extreme heights of said mountain to the place where the Watauga River breaks through it; thence a direct course to the top of Yellow Mountain where Bright's road crosses the same; thence along the ridge of said mountains, between the waters of Doe River and the waters of Rock Creek to the place where the road crosses Iron Mountain; thence along the extreme heights of said mountain to the place where Nollichucky River runs through the same; thence to the top of Bald Mountain; thence along the extreme heights of said mountain to the painted rock on the French Broad River; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountains; thence along the extreme heights of said mountain to the place where it is called Unicoi or Unaka Mountains between the Indian towns of Cowee and old Chota; thence along the main

ridge of said mountains to the southern boundary of this state, as described in the cession act of North Carolina to the United States of America."

The necessity for a definite location and marking of the line between the two states became evident to both States in 1819 (Revised Statutes 1837, Vol. 2, Page 96) and the State of North Carolina passed an Act authorizing the appointment of commissioners to settle, run and mark the boundary line between this state (meaning North Carolina) and the State of Tennessee "agreeably to the true intent and meaning of the Act of the General Assembly of this state entitled an Act for the purpose of ceding to the United States certain western land therein described, beginning at the point where the line terminated, run in 1819, under the direction of McDowell, Mathews and Vance."

On July 20th, 1820, the State of Tennessee by Act of the General Assembly provided for the appointment of three commissioners to meet the commissioners of North Carolina, and with them to settle, run and remark the boundary line between this state and North Carolina, *agreeably to the true intent and meaning of the Act of the General Assembly of North Carolina entitled "An Act for the purpose of ceding to the United States certain western lands therein described, commonly called the Cession Act."*

To carry out said act, the Governor of North Carolina appointed Joseph Mebane, M. Stokes and R. Love as commissioners. The State of Tennessee appointed A. Smith, Isaac Allen and Simeon Perry as commissioners.

These commissioners met at Newport in the State of Tennessee on July 16th, 1821, and proceeded to run and mark the line, as appears from the report made by his Excellency, the Governor of the State of Tennessee. The line the commissioners ran was described by them in their report, which is of record on page 51. The report is as follows:

> "Respectfully report that we proceeded to ascertain, run and mark the said dividing line as described in the 11th Article of what is called the Declaration of Rights and the Constitution of Tennessee and the Act of the General Assembly of the State of North Carolina, entitled, An Act for the purpose of Ceding to the United States of America certain western land therein described, passed in 1789, which said dividing line as run begins at a stone set upon the north side of the Cattalouchee Turnpike road and marked on the west side "Ten 1821" and on the east side "N. C. 1821," running thence a southwest course to the Bald Mountain on the summit of Great Iron or Smoky Mountain and continuing southwest on the extreme heights thereof, to where it strikes the Tennessee River about seven miles above the old Indian town of Telassee, crossing Porter Gap at a distance of twenty-two miles from the beginning, passing Meigs boundary line thirty-one and a half miles, and Equonetllee path at fifty-three miles, and crossing Tennessee River at a distance of sixty-five miles from the beginning. *From the Tennessee River to the*

main ridge along the extreme heights of same to the place where it is called the Unicoi or Unaka Mountains, striking the old trading path leading from the Valleytown to the overhill towns, near the road from the west fork up the Tellico River, and at the distance of ninety-three miles from the beginning; thence along the extreme heights of Unaka or Unicoi Mountains to the southeast end thereof at the Unicoi or Unaka Turnpike road where a corner stone is set up and marked "Ten" on the west side, and "N. C." on the east side, and where a hickory tree is also marked on the south side "Ten 101 M" and on the north side "N. C. 101 M" being the 101 Mile tree from the beginning; from thence a due south course two miles and 253 poles to a spruce pine on the north bank of the Hiawasee River below the mouth of Cane Creek, thence up the said river the same course about one mile and crossing same to a maple, marked W and R A on the south bank of the river; thence continuing the same course due south 11 miles and 223 poles to the southern boundary of the States of Tennessee and North Carolina."

The commissioner filed with this report a map which is marked Exhibit C to the answer of the State of Tennessee.

The General Assembly of the State of Tennessee, Acts of 1821, Chapter 45, p. 35, ratified and confirmed and adopted the line ran by the commissioners in the following language:

"Be it enacted by the General Assembly

of the State of Tennessee that the dividing line run and marked by Alexander Smith, Isaac Allen and Simeon Perry, commissioners for and on behalf of this state; and Joseph Mebane, Munford Stokes and Robert Love, commissioners for and on behalf of the State of North Carolina, which dividing line as run by said Commissioners begins at a stone set up on the north side of the Cattalouchee turnpike road and marked on the west side "Ten 1821" and on the east side "N. C. 1821" running thence a southwest course to the Bald Rock on the summit of the Great Iron or Smoky Mountains; continuing southwest on the extreme heights thereof to where it strikes the Tennessee River about seven miles above the old Indian towns of Tellassee crossing Porters Gap at a distance of twenty-two miles from the beginning, passing Meigs boundary line at thirty-one and one half miles, and Equonetllee path at fifty-three miles and crossing the Tennessee River at a distance of sixty-five miles from the beginning; from the Tennessee River to the main ridge and along the extreme heights of same to the place where it is called Unicoi or Unaka Mountains, striking the old trail or path leading from the valley towns to the over hill towns near the west fork of Tellico River at a distance of ninety-three miles from the beginning; thence along the extreme heighs ot the Unicoi or Unaka Mountains to the southwest end thereof at the Unicoi or Unaka turnpike road where the corner stone is,

being marked Ten on the west side and N. C. on the east side, and where the hickory tree is also marked on the south side Ten 101 M and on the north side N. C. 101 M, being 101 miles from the beginning; from thence due south course two miles and 253 poles to a spruce pine on the north bank of the Hiwassee River below the mouth of Cane Creek; thence up the bank of the said Hiwassee River the same course about one mile, and crossing same at a maple marked W. B. and R. A. on the south bank of the river; thence continuing the same course south 11 miles and 223 poles to the southern boundary line of the State of Tennessee and North Carolina, making in all 116 miles and 223 poles from the beginning, and striking the southern boundary line 23 poles west of a tree in said line marked 72 M, where there was set up by the said commissioners a small post marked on the west side Ten 1821 and on the east side N. C. 1821, and on the south side G. B. and the same is hereby ratified and confirmed and established as the true boundary line between this state and the State of North Carolina."

The boundary described in the North Carolina confirmatory act is in words identical with those used in the Tennessee Act, and closes in these words:

"The whole distinctly marked with two chops and blazes on each fore and aft tree and three chops on each side line tree, and a mile mark at the end of each mile."

That part of the line here involved is described in these words:

> "From the Tennessee River to the main ridge and along the extreme heights of the same to the place where it is called Unicoi or Unaka Mountains."

The words "from the Tennessee River to the main ridge" were not used in the cession act to describe the line, and because of these additional words in the report of the Commisisoners and the confirmatory acts the State of North Carolina insists that the words "main ridge" are the controlling words in the description and that the Fodderstack lead, the State Ridge and Jenks Ridge are but local names for different parts of the main ridge on which the commissioners ran and marked the line, and that the main ridge is the ridge having the greatest area, the widest base. In other words, the size and not the height is the test as to what is meant by the "main ridge." But the language used by the commissioners in the report and the language used in the confirmatory act of the two legislatures describing the line, cannot be construed independently of the cession act, and independently of the acts of the respective legislatures authorizing the appointment of the commissioners and defining and limiting the power and authority conferred upon them. If we leave out of sight for a moment the report of the commissioners and the confirmatory act, we find that the line described by the cession act, is as follows:

> "Beginning at the Great Iron and Smoky Mountains thence along the extreme heights

> to the place where it is called Unicoi or Unaka Mountains."

No mention is made of the main ridge or main mountain. That ridge having the extreme height is certainly the ridge or mountain meant to be controlling in the description of the cessions act. To get the word "main ridge" to mean what is insisted upon by the State of North Carolina would reverse the meaning of the cession act and make it read "thence along that ridge or lead of ridges having the widest base" instead of along the extreme heights of the mountain.

The authority conferred upon the commissioners was not general and was not discretionary, but limited and restricted. They were not to establish and mark a new line. They had authority only to run and mark the line described in the cession act. Their duty was defined in the following language:

> "To settle, run and mark the boundary line between this state and the State of North Carolina, agreeably to the true intent and meaning of said act."

Referring to the cession act.

The language is mandatory. It enjoins on the commissioners the running of this line along the mountain range having the extreme height. We cannot suppose they were indifferent to this express command, and when they used this language, they meant by "main ridge" that ridge having the highest altitude. It was but another description for the mountain mentioned in the cession act from whose extreme height the line was to be located.

That part of the line in controversy in this case is described in the cession act as follows:

> "Beginning at the Great Iron and Smoky Mountains thence along the extreme height of the said mountains to the place where it is called the Unicoi or Unaka Mountain."

That part of the line in controversy in this case is described in the Constitution of the State of Tennessee in the identical terms of the cession act, and the language is as follows:

> "Beginning at the Great Iron or Smoky Mountains, thence along the extreme heights of said mountain to the place where it is called the Unaka or Unicoi Mountain."

And as we have seen, the authority conferred upon the commissioners was to run this line and no other line, they were to run the line agreeably to the cession act and in accordance with its true intent and its true meaning. They could run the line at no other place than along the extreme heights of this mountain.

THAT RANGE OF MOUNTAINS STRETCHING FROM THE TENNESSEE RIVER ON THE NORTHEAST TO THE HIAWASSEE RIVER ON THE SOUTHWEST WAS CERTAINLY THE RANGE OF MOUNTAINS MENTIONED IN THE CESSION ACT FROM WHICH THIS LINE WAS TO BE LOCATED.

Exhibit 1 to the deposition of W. D. Hale, is a map upon which is delineated the mountain range from the Tennessee River to the Unicoi Mountains as insisted upon by the State of Tennessee, and also the range as insisted upon by the State of North Carolina. On this map the altitude of these respective ranges are marked at different places, at short intervals, so that the court can see at a glance, and determine which range sustains the "extreme heights" between the Tennessee River and the Unaka Mountains. This map shows that at the point where the line crosses the river, the line has an elevation above sea level of 1050 feet; that immediately across the river from and opposite the fore and aft tree, the elevation of the Hangover Ridge is 1950 feet; and ascending to the crest and following the crest in a southwest direction on this range, we find the following elevations. At Sourwood Gap 1800 feet; at Slick Rock Gap 1750 feet; at Hangover 5100 feet; at Hao 5200 feet; at Stratton Bald and Junction of the Fodderstack with the Hangover 5300 feet.

On the other hand, the line from the crest of Fodderstack and down said Fodderstack to Rock Creek and with the creek to the river has an elevation as follows:

At the junction with the Hangover it is 4200 feet; at Glenn Gap 3900 feet; and the elevations then become less and less as you approach the river.

W. D. Hale testified to the accuracy of these measurements, and John L. Williams and Oscar W. Muller assisted him in making them (Record p. 1172.)

Mr. Gannett, one of the principle witnesses for the plaintiff made the following statement as appears in the record on pages 469, 470, 471 and 472. After stating that he took the elevations from the Mantahala Topographical Sheet of the United States Geological survey, he said in answer to the following questions:

> "Q. Now, take a distance from the river of half a mile southwest according to the Tennessee contention, that is, on the line southwest from the river according to the Tennessee contention and tell me what is the elevation at that point?
>
> "A. 1800 feet or about 700 feet above the river.
>
> "Q. Now, take a point half a mile from the mouth of Slick Rock up the creek and tell me the elevation?
>
> A. Fifty feet above the river."

He then stated that according to the Tennessee contention that one mile from the river going south the elevation was between 1700 and 1800 feet, or 600 feet above the river. That one mile from the river going south, according to the North Carolina contention it was 100 feet above the river; that two miles according to the Tennessee contention it was 850 feet above the

river, and according to the North Carolina contention 250 feet above the river; three miles according to the Tennessee contention it was 2350 feet above the river and three miles according to the North Carolina contention was 600 feet above the river; that four miles according to the Tennessee contention along the Hangover Ridge it was 2600 feet above the river, and four miles according to the North Carolina contention it was 850 feet above the river; that five miles according to the Tennessee contention it was 3000 feet above the river, and five miles according to the North Carolina contention it was 900 feet above the river; that six miles from the river, according to the Tennessee contention it was 4000 feet above the river, and six miles according to the North Carolina contention, it would be 3100 feet above the river; seven miles, according to the Tennessee contention would be 3900 feet above the river and seven miles, according to the North Carolina contention would be 3300 feet above the river. (Record pp. 470 and 471.)

From the place called in the record, the junction or Stratton Bald, meaning the place where the Fodderstack lead joins the main Hangover lead, the line proceeds in a southwest direction passing through Lick Log Gap, Big Cove Gap, Lick Gap, Stratton Grave, Meadow Gap, Laurel Top, the location of this section of the line is not in controversy, both the State of Tennessee and the State of North Carolina conceding it to be correctly located. (Record 1179)

From Laurel Top the State of Tennessee insists the line should continue on top of the main

ridge known in the record as the divide or watershed, that it divides the waters, those rising on the west side of the ridge and at its base flowing into Tennessee, such as the Tellico River with its many branches, the Citico and other streams. On the east side the Santalah, the Cheoah and Snowbird Creek and many other creeks flowing off to the east and into North Carolina, and no water runs through, across, or over this ridge between the Tennessee River and the Hiawassee River. This ridge is called the Hangover lead up next to the Tennessee River. It connects with the range here called the main divide or watershed range, and this last range connects with the Unicoi or Unaka Mountains mentioned in the cession act, making a continuous, unbroken range for a distance of more than fifty miles.

To run the line as insisted upon by the State of Tennessee, beginning at Laurel Top and proceeding on South it would turn eastwardly passing over the following places with the following elevations:

Mitchell Lick 4640 feet; Buffalo Stamp 4850 feet; Peckerwood Ridge 4750 feet; Cold Spring Knob 4300 feet; McDaniel Bald 4625 feet; Dead Tree Gap 4425 feet; Big Cold Spring 4450 feet; Bear Pen Knob 4475 feet; Lovingwood Gap 5735 feet; Buzzard Roost Gap 3920 feet; Rock Knob 4235 feet; Tipton Gap 3325 feet; Hawashaw Knob 3600 feet; Tipton Knob 3650 feet; Jenks Knob 3850 feet.

From Jenks southwest to the southern boundary of the State, the location of the line is not questioned.

Jenks Knob stands at a point where Jenks

Ridge joins the main range known as the divide or watershed. Jenks Ridge is but a spur of the main ridge. It leads off from that ridge in a northeast direction and terminates some distance south of and before it reaches the Tellico River.

There is another ridge called in this record the State ridge. It is but a spur of the main ridge, leading off from the main ridge, called the watershed or divide in a southwesterly direction. It also terminates before it reaches the Tellico River.

One of the witnesses describes the ground forming the connection between Jenks Ridge and the State Ridge, and shows the condition as follows: He says the ridge called the State Ridge does not reach the Tellico River by three of four hundred feet and there is a bottom between the end of the ridge and the river, that between the two ridges and on the west and south sides of the Tellico River, leaving the river you go by a broad face, in a depression. In that space there is a lower point to the right and left. It looks as if you were starting up a hollow. In going up some two or three hundred feet from the river you are rising on rather steep ground, but you are in a hollow. After you get three or four hundred feet from the river you come out on a little backbone first and follow that up two or three hundred feet and the spur disappears and you are on the broad face of Jenks Ridge. There is a small stream passing over the ground between the end of Jenks Ridge and Tellico River (Record p. 1154.)

The State of North Carolina insists that the line should be located from Laurel Top, going in

a southwest direction along the crest of State ridge and thence crossing the valley between the end of State Ridge and the end of Jenks Ridge, ascend Jenks Ridge and then proceed along the crest of Jenks Ridge to the junction of that ridge with the main ridge. The Tellico River runs through this valley between these two ridges, and the line, if located, as here insisted, crosses the Tellico River at a point where it is sixty-six feet wide. (Record p. 1169).

The map made Exhibit No. 1 to Mr. Hale's deposition shows the elevation along this line, and Mr. Hale (Record p. 1163) gave these elevations as follows:

At Grassy knob on the main divide 5000 feet; at this point Grassy Knob divides into State Ridge and Rough Ridge 4950 feet is the elevation, then on the line toward the Tellico River, the elevation from the beginning at short intervals are as follows:

4000 feet, 3825 feet, 3675 feet, 3725 feet, 3450 feet, 3400 feet, 2975 feet and 2480 feet. The elevations along Jenks Ridge as shown on the map are as follows:

2525 feet, 3125 feet and 3175 feet. The elevation of the valley between the end of State Ridge and the end of Jenks Ridge is not given.

Now, the elevations beginning at the Tennessee River and ending at Jenks Ridge south of the Tellico River and passing over the two sections of the State line in dispute shows that the Hangover lead and the main divide are the ridges that sustain the extreme height along which the cession act provides the State line should be located south of the Tennessee River.

THE HANGOVER LEAD RIDGE, AND THE RIDGE CALLED THE DIVIDE OR WATERSHED WHICH CONNECTS THE HANGOVER WITH THE UNICOI OR UNAKA MOUNTAINS, NOT ONLY SUSTAINS THE EXTREME HEIGHTS, BUT IS THE MAIN RIDGE MENTIONED IN THE REPORT OF THE COMMISSIONERS, AND THE CONFIRMATORY ACTS OF THE GENERAL ASSEMBLIES OF THE STATES OF NORTH CAROLINA AND TENNESSEE.

From the map made Exhibit No. 1 to Mr. Hale's deposition, it will be seen that Jenks Ridge State Ridge, and Fodderstack Ridge are merely spurs leading off from the main ridge. The Fodderstack runs northwestwardly toward the Tennessee River, and divides up into the smaller spurs. None of these spurs reach the river. It is also shown by the map made Exhibit A to the answer and cross bill. At the point where the Fodderstack leaves the main ridge at Stratton Bald, the main ridge is shown by elevation marked on Exhibit No. 1 to Hale's deposition as 1100 feet higher than the crest of the Fodderstack, and this is the highest point along the Fodderstack over which the State of North Carolina insists the line runs. These elevations on the Fodderstack get less as you approach the river until at Slick Rock Creek they are reduced to fifty feet above the river. The line contended for by North Carolina runs along the spur five or six miles, when it leaves the spur for Slick Rock Creek and then with that creek to the river.

This spur, as we insist, cannot be considered the main ridge spoken of in the commissioners report and in the confirmatory acts of the two legislatures. The State Ridge and Jenks Ridge as appears from said map, Exhibit No. 1 to Hale's deposition, are but spurs leading off from the main divide or ridge known as the watershed. There is no connection between these two ridges, nor does either of them connect up with any other ridge after leaving the main divide, or the main ridge. There is a wide valley separating them, through which the Tellico River flows and neither the State Ridge nor Jenkins ridge, or either of them, can be considered the main ridge mentioned in the report of the commissioners or the confirmatory acts of the legislatures.

The place called the Great Iron or Smokey Mountain is north of the Tennessee River. From that point the call in the cession act, brought in question in this case, reads "thence along the extreme heights of the same to where it is called the Unicoi or Unaka Mountains." This section of the line starts from a point on the top of the Great Smokey Mountains. Then it follows along the heights of the same to the place called Unicoi or Unaka Mountains. The line, of course, had to cross the Tennessee River, but with that exception, this call in the cession act intended that the line should run along a continuous mountain until it reached the Unaka or Unicoi Mountains. The Great Smokey, the Hangover, the divide or watershed, are the only ridges or mountains that meet and satisfy this call in the cession act. The Hangover connects on the north with the Great Iron or Smokey Mountains and

on the southwest with the divide or watershed, and this ridge connects up with the Unaka or Unicoi Mountains, showing a connected and well defined ridge from the Cattalouchee Turnpike road on the northeast to the place called the Unaka Mountains on the southwest, a distance of 100 miles, (Record p. 1211), and broken only by the Tennessee River (Record p. 1372). This mountain or ridge is described by one of the witnesses in the following language:

> "The Hangover lead or ridge is undoubtedly the main ridge in this section of the country. In traveling northwardly I can see the main top of the Unakas on the State line of Tennessee and North Carolina and follow this line to the junction of the Hangover and Fodderstack lead, we see before us towering above all the neighboring points, and in that direction showing Stratton Bald, the Hao, Christies Peak and the Hangover, all connected by a narrow leading ridge, from the Hangover, tending a little more west this ridge gradually descends to the river having but few gaps, most high, until it bluffs at the river gorge. On the north side of the river, up about an equal elevation of that place, rising from the river almost a counterpart of the bluff on the south side, and continues in the same general direction to the Smokies, and connecting ridges between the higher points overlooking the highest points of the surrounding country, the lowest gap between Stratton Bald and the Hao appearing to be 400 feet above this Fodderstack, the highest

point in that ridge, and the prominence is unmistakable. The Fodderstack ridge at the junction drops off on a wide flat descent nearly at right angles with the general direction of the leading ridge and the principle point being Big Fodderstack and Little Fodderstack. This lead has several prominent prongs," etc. (Record p. 1373)

Another witness, Mr. Mueller, (Record p. 1277) testifies that from a point on the State line 6000 feet north of the Tennessee River, you could follow the crest of this ridge or mountain with your eye thirty miles south from the Hangover and that it loomed up and unbroken, connected and well defined mountain or ridge from the Tennessee River to the Hiawassee River, a distance of forty four miles (Record p. 1201) across which no water flows.

Mr. W. D. Hale, in his testimony says the Hangover and ridge which is called the watershed or divide connects and forms the main ridge from the Tennessee River to the Unaka Mountains, and then proceeds to give the elevation as hereinbefore described. (Record p. 1160-1-2)

Mr. J. H. Wilson, testifies the highest and most prominent ridge or mountain in this section is the ridge or mountain from Hangover to the Stratton Bald, and no other surrounding ridge corresponds as well in course as the Hangover. He describes it as the ridge dividing the waters of Slick Rock Creek from the waters of Bear Creek, leading directly up to the Hangover Mountain. This ridge butts up at the river immediately opposite where the line strikes the river on the north side, and the natural supposi-

tion would be that the State line would go straight across the river. And on Page 1348 he said he ran the line down to the Hiawassee River thirty to thirty seven miles beyond where the two ridges came together, meaning the Hangover and Fodderstack. He says that the Hangover, the divide or watershed and the Unaka Mountains are the largest, most prominent and the main ridges from the Tennessee River to the Hiawassee River.

John L. Williams (Record p. 1411) testified as follows:

> "The Hangover Ridge is the only ridge that I can construe as the main ridge at all, and I thought that before I went there, because I had been acustomed to see the Hangover Ridge for a good many years. I worked in Tellassee vicinity back in 1903, and in traveling up and down the Louisville & Nashville Railroad, if it was a clear day, in crossing the Little Tennessee River, I always looked out to Hangover Mountain. I have looked at Hangover from the bridge across Little Tennessee River for the last three years or more, and I can see the Hangover and Hao and Stratton Bald from the point on the river some twenty miles below, and except under more favorable circumstances cannot see the Fodderstack Ridge at all. That is, the Hangover Ridge is standing out above the Fodderstack so that the Fodderstack is between and below the top of Hangover, and except under favorable circumstances, you cannot see the Fodderstack ridge at all. I have been on all

sides of Hangover except the east side, and it appears to be high, and it appears to be the main ridge from all directions and from all distances that I have seen it. It is the very much higher ridge, and particularly so from where the ridge is separated. It is difficult to find where the Fodderstack Ridge leaves the Hangover Ridge. The first time I was at that point, I was with Mr. Hale, and didn't know anything about where it was. I expected it would take me quite a while to hunt it. He said the only way we could get to it would be to find the trail, and if he had not been along with me, I would not have known the trail leading to the Fodderstack Ridge at all."

Mr. Oscar W. Muller (Record p. 1292) said, reduced to narrative form:—

"I have been to the north side of the river and viewed that line running down the Little Tennessee River, and followed on down the line, and from there run it to Jenks Knob. I find nothing to change my opinion formed on a former investigation. There is no difficulty in following the ridge southwestwardly from the Hangover. The line for some distance there, eight or ten miles is undisputed. There is no difficulty in following the main ridge of the mountain."

In view of all this evidence, Judge Lurton, in delivering his opinion in the case of Belding against Hebard, 103 Fed. Rep., 532, said:

"The intention of the North Carolina

cession act in 1789 was to make the crest of the Great mountain region extending across the State of North Carolina in a southwesterly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described. The painted rock on the French Broad River is a natural monument of great notoriety. From that point the calls in the cession act are, thence along the highest ridge of said mountains to the place where it is called the Great Iron & Smokey Mountains, thence along the main ridge of said mountains to the place where it is called the Unaka or Unicoi Mountains, between the Indian towns of Cowee and Old Chota. That part of the Great Mountain range called the Smokey Mountains is well known and is also that part of the same range southwest called the Unaka or Unicoi Mountains. There is no trouble about the location of these two great natural monuments in the line. The distance between the two is not less than fifty miles, and the only call which is locative of the line between the two is that the line is to be run along the extreme heights of the said range theretofore called the Great Iron or Smokey Mountains to that part of the ridge or range called the Unaka or Unicoi Mountains. The Commissioners representing the two states were not authorized to agree upon a new boundary, but to settle, run and remark the boundary lines agreeably to the true intent and meaning of said cession act of 1789. It is clearly

their duty to run and mark the line between the Great Smoky and Unaka Mountains, following the extreme heights of the mountains ranges connecting these two prominent points."

The line from the point in the Great Iron or Smoky Mountains from the Hangover and around the divide are connecting links between the Unaka or Unicoi and the Great Iron or Smoky Mountains. No other ridge could have been in the minds of the Legislature in passing the cession act, and no other ridge could have been in the minds of the commissioners in reporting the line beginning at the Tennessee River, thence to the main ridge, because it is the main ridge and the only ridge that fits and satisfys the call in the cession act, and in the report of the commissioners and the confimatory acts of the legislatures.

MARKED LINE

The line from the Hangover, the Hao, and Stratton Bald, along the crest, and around the head of Tellico River to the Unaka Turnpike Road, is marked with State line marks as provided in the North Carolina confirmatory act. These marks being two chops and a blaze for fore and after trees and three hacks for side line.

In approaching the river from the northeast along the State line, as hereinbefore shown, at a point some six thousand feet from the Tennessee River, the Hangover ridge, the ridge known as the divide, and the Unicoi or Unaka Mountains, forming a connecting chain from the Ten-

nessee River to the Hiawassee River, can be seen for a distance of thirty miles. The line on the north side of the river is marked down to a fore and aft tree, a spruce pine.

A fore and after tree always indicates the direction or course of the line. It is marked on the side from which the lines approaches the tree and is marked on the opposite showing that the line passes through the tree. This spruce pine was so marked, (Record p. 1424-1300) and showed that the line passed directly across the river and from this point to the foot of the spur of the Hangover lead.

Mr. Hale describes this situation, as follows:

> "In running the line I was governed to a great extent by the topography of the country south of the river looking southwest from the butt of the ridge north of the river, on which the line is marked, I first looked for the main ridge and see two prominent ridges, the Hangover Ridge and the Fodderstack Ridge, of which the Hangover Ridge is decidedly the highest and most prominent. Second, I looked for the route to the Hangover Ridge and saw a large and continuous ridge reaching from the Hangover Peak to the river, directly opposite where the line is marked north of the river. Third, I observed the course of the Hangover and the Ridge leading to it to be a little west of south, while to reach the Fodderstack ridge where it strikes the river, I would have to go northwest down the river half a mile, and from there nearly due west more than three miles. (Record p. 1313) The Hangover

ridge follows the general course of the State line north. I surveyed the Hangover ridge commencing opposite the marks on the north side and ran up the ridge. Three-fourths of a mile from the river I found a black oak marked as a corner and some slight indication as if it had been marked as a line tree on the State line. At one mile from the river a double sourwood in a gap, plainly marked fore and aft state line. At one and one-half miles a chestnut oak with indications of marks. The blaze is plain and one hack can be seen on close examination. Near the chestnut oak is a white oak that bears some indications of marks on the northeast side. At one mile and ninety-eight chains, I used a two pole chain, a small hickory marked with state line marks on the east side of the tree. At one mile and one hundred and eight chains is a spanish oak marked as a North Carolina corner and witnessed by six pines. At one and seven-eighths miles a white oak marked with three hacks above a blaze and a very old blaze immediately below the three hacks. I followed a marked line running from this point south 15 west into North Carolina. At two and one-fourth miles a black oak on top of a high knob, marked with three hacks above and blazed on north side and two hacks above and one hack below a blaze on the west side. At two and one-fourth miles a chestnut and two white oaks as North Carolina corner. At three and one-fourth miles a chestnut

oak stump bearing a plain blaze and indications of two hacks above the blaze, the lower hack is plainer than the upper one. At three and one-half miles a small black oak marked with two hacks and a blaze, but the marks are too recent for state line marks. At four and one-eighth miles a chestnut with slight indications of marks on the west side. The bark had been burned off the east side. I found no other marks until after I passed the Hangover Rock five and five eighths miles from the river and the Hao and the Christie Peaks six miles from the river. At seven and one-half miles from the river I found a small mountain oak marked fore and aft with two hacks and a blaze, but by comparing with marks blocked, I find the marks too recent for State line marks. At seven and three-fourths miles from the river I found a mountain oak nine inches in diameter fore and aft with two hacks and blaze. This tree was forked and the east prong was split off, carrying with it the marks but they still showed on the wood and bark. By count I find these marks too recent for State line marks. A little higher on the tree and deeper in the wood there are some other scars which very closely resemble the State line marks. The blaze plainly showed traces of the ax, but the hacks do not show the traces of the axe so clearly. The diameter of the tree, when these scars were made was two and one-half inches. It is now nine inches and a very slow growth. I

found no other marks until after I passed the junction of Hangover and the Fodderstack ridges."

John K. Wilson, being asked to state fully his survey up to the Hangover and on to where it and the Fodderstack came together on the southwest said:

"The best way to answer this question is to quote from my individual field notes. At station 94 I have 'to stake by black oak, has plain evidence of old state line mark—blaze, one hack plain, the other hack not so plain. On the south side not plain and cannot say it has them on that side. At station 100 the double sourwood sanding 1.2 chains west of the center of the sourwood gap. This sourwood has an old state line mark plain and large and one fore and aft and a smaller one on the northeast side.' On re-examining this double sourwood on January 29th, I have the following notes: 'The smallest tree has on the east side two hacks and a blaze.' That I believe is the old state line. Then it has two blazes above the two hacks and a blaze, but they are more recent. It has also five irregular hacks on the south side. The largest one has an old state line mark, two hacks and a blaze on the east side, blaze nearly gone, and also the two hacks and blazes, state line marks on the west, but the upper hack is made with two licks of the axe. It has also one recent hack on the south side. On station 106 I passed a black oak fore and aft, has two blazes, plain, the hacks were not

plain. To station 114, to a stake, 9 west and 38 links, from this station stands a black oak with North Carolina corner; three hacks on the east and three hacks on the south, and no cross. The above station is four and four tenths chains from Slick Rock Gap. The station 113 passing chestnut oak, indicates state line, side line marks, blazes plain, but marks not so plain. Also passed white oak which shows evidence of two hacks on the northeast side but no evidence of marks on the other side. Under Station 114 face of ridge broad, at 5.3 chains passing a side line hickory, two hacks and a blaze on the east side. The hickory stands one chain east of our line. Under Station 116 to stake on first top from Slick Rock Gap, one pine marked M. W. H. and a Spanish oak and a lot of pines marked with two hacks, blaze under, then hacked under the blazes thus ——— blazed to be a North Carolina corner. Under Station 120 to a large white oak with three hacks above a blaze, fore and aft, rather new. On the north side is a very old blaze below a younger blaze, looks like new blaze had cut out hacks. There is also on the east side two hacks. There is also on the east side two very old hacks, line marks, and the line runs south 15 1-2 west. Station 128 to black oak on high knob at head of Cain Branch ridge, a black oak has three hacks above a blaze on the north and south, and two hacks above a blaze and one hack below the blaze on the southwest. Station 132 near

large chestnut with two hacks above blaze and one hack below same blaze. Seems to be North Carolina corner. Under Station 148 passed an old chestnut oak with plain blaze like state line and indications of two hacks above on the east side. West side burned off. Station 152 passed small black oak, two hacks and blaze under on west side and above it a hack, a blaze and a hack thus ———. Under Station 163 passed a small chestnut at three chains with two hacks above a blaze, both rather new. Station 165 passed a few burned chestnuts with indications of state line marks. I had no other trees noted until after I passed the top of Hangover Peak, but one or two small mountain oaks between the Hangover and the place where the Fodderstack lead strikes the same, except two small mountain oaks, one of which was split open, and we counted twenty-two years growth, also the other was too young for state line. Marked trees that we have supposed to be North Carolina corners were marked as though the land lay on the east side of the ridge. I will state that some half mile before getting to the Hangover the Laurel set in, and we found no trees old enough to hold marks. Also after passing the Hangover peak there is hardly any tree of a character to hold very old marks, being scrubby beech, buckeye, and birch, and in fact, for a great part of the way, the comb of the mountain is bare of timber." (Record 1347.)

O. W. Muller (Record 1370) says:

"We surveyed along the top of this leading ridge which runs in a direction a little west of south to the top of the Hangover, and over the high and prominent peaks, thence its trend is more west, being near southwest from the Hangover, passing the Hao, the highest point in that region, the Stratton Bald, and continuing in the same direction towards Stratton meadows. Several depressions in the leading ridge commonly called gaps. There are marked trees on this line made at different periods, some very old, so as to be almost extinguished, some recent, apparently only twelve or fifteen years old, also many indications of corners. Some of these markd trees are so indistinct as to be scarcely discernable, the bark having sloughed off of some, leaving merely ax signs. These we did not know. At a depression, the Sourwood Gap, about one mile from the river, we found a double sourwood very plainly marked having characteristics of state line marks as a fore and aft tree. This tree is old and the tooth of time will soon obliterate the mark, as a part of the bark is beginning to loosen and decay. Passing Slick Rock Gap and ascending about one fourth mile from the sourwood is a small scrubby hickory with a plain state line mark, marked as a side line, and a little further on an old chestnut oak stump with same marks that bear the stamp of age. From this place on as we ascended to higher ground, we found no more state line marks we considered distinct enough to

note, and the land marks and corners indications seemed to show more age as we ascended, until on the highest ground, the marked trees of all kinds disappeared, and the timber becomes more scrubby and of such a nature that it would not preserve a mark in the bark but a short time."

Also see evidence of John L. Williams (Record pp. 1412 and 1434).

The evidence also shows with reasonable certainty that the line around the head of Tellico River on the main divide between Laurel Top and the junction of the State Ridge with the main divide is marked with state line marks. (Record 1299-1211.)

STATEMENTS MADE DETAILING CONVERSATIONS WITH OLD CITIZENS AS TO LOCATIONS OF THE STATE LINE.

The defendant has introduced testimony showing statements made by old citizens, now deceased, as to the location of the State line, as follows:

James L. Nelson, testified that William H. Thomas, who was formerly a Senator in the General Assembly of the State of North Carolina, in conversation with him stated that the line between North Carolina and Tennessee was on the ridge between Slick Rock Creek and Bear Creek, that is along the Hangover Ridge or lead. That this conversation was some fifty-seven years ago, or about the year 1853; that he had understood the state line to be along Hangover ridge for the last fifty-seven years.

All the old people told him the ridge was the line, and that this was the general understanding. (Record pp. 938, 945.)

Pleas Henry testified as follows: (Record pp. 949, 956.)

> "I was always told that the State line south of the Tennessee River ran up the Hangover lead and on over the Hao. Old man Jack Milligan and Atlas Crowder told me that. Old man Crowder lived between Big Fodderstack and Little Fodderstack. This conversation was in 1875, and he was then over sixty years old. He is now dead. Milligan lived on Tellassee Creek and I had a conversation with him in 1870, he was then sixty years old."

He also states that he leased the land from Slick Rock to the top of Hangover, that is the land in between these two lines, from the two McCroskys in 1890 and 1891, and that they controlled the land.

He had a conversation with one David Orr, who told him that the line ran just below his little mill and from there straight west to the top of Hangover lead.

Milton Williams (Record p. 966) stated that he once lived in Yellow Creek township in North Carolina just east of the Hangover ridge, that the Hangover ridge was always considered the state line, never heard it disputed until the trouble came up between Hebard and Belding. People who lived east of the Hangover Ridge lived in North Carolina and people who lived on the west side lived in Tennessee. He says the line

was pointed out to him by his grandfather, Ben Johnson and Mack Carr, and an old man named Beaver, all old residents. That these men charged their herders, they were cattle raisers, not to permit the cattle to cross over the Hangover divide, that that would be in Tennessee. His grandfather and Carr took him along to herd cattle and they stopped on the State line and fed their horses, and they pointed out the State line where it came around over the Hangover, and he states you could see all the way on the north side. They pointed out the Hangover and the Hao, and the state line passed over them, and that it crossed the river half a mile north of the mouth of Slick Rock Creek.

W. R. Carringer, (Record p. 981) said:

> "My father's name is John Carringer, he is eighty years old. He and I were traveling through the Slick Rock Gap, and my father said to me, that ridge, the Hangover, was the line between North Carolina and the state of Tennessee."

Robert Grant (Record pp. 1027-8) was overseer of the road in North Carolina and was directed not to go further west than Slick Rock Gap, that the territory between the Hangover and Cheoah was under his jurisdiction. Old man Orr stated to me that he built the road over to Tennessee and was stopped at Slick Rock Gap, that the land west of Slick Rock Gap was in Tennessee.

John W. Stratton, (Record p. 1029) eighty-three years old, was born in Munroe County, on Tennessee River. He was a North Carolinian

and lived on Tellico River within two hundred yards of the line for ten years, at the head of the north prong of Tellico River, had a stock farm there for ten years, his nearest neighbor was ten miles. This was about six miles from Laurel Top. He said:

> "My grandfather was buried on the line or where they said the line was. He was a North Carolinian, and selected the place where he was buried. The line as lately run was right over the grave."

He said that he had been from Hanging Dog Creek to Murphy along the State line, following a straight ridge all the way, running around from Laurel Top over the Bald, that it is a well defined ridge and can follow it with horses.

He heard Levi Mashburn tell about the location of the State line by the commissioners in 1821 around the headwaters of Tellico River. He was one of the chain carriers and worked with witness afterwards. He said when they got to the top of Laurel Top, the fog came on thick, and they ran on past the gap down the State ridge, until they saw they were wrong, and that they stopped and went across the stream to the top of the ridge, meaning the divide, the ridge running around the headwater of the Tellico River; that he often made these statements while he was living up at the state line at the head of the river. His father entered six or seven (hundred acre) tracts. Two of the entries were on the North Carolina side and at the head of the north prong of the Tellico River and at the head of one prong of the Santellah River. The other

entries were at the Mitchell Lick, where the surveyors got lost.

J. W. Piercy, who ran out these tracts of land would go no further west than the top of the divide between Tellico River and the waters of North Carolina Snowbird and Santellah and Buffalo Creek. Piercy said the divide was the state line. He has seen the corners on the state line at Mitchell Lick south of Laurel Top. It was a gap just to the left of the gap. Has been on the state line around Stratton Bald to the Tennessee River, has kept cattle on Stratton Bald.

Hoyt, a surveyor, told him—Hoyt is now dead—that he ran from the Smoky Mountains across, and ran up the Bald Rock called the Hangover. This was eight or ten years ago. His business was to locate the line and he said that line ran down the Bald Lead or Hangover. between Slick Rock Creek and Bear Creek. This might have been in 1870. Hoyt was an old man at that time. Hoyt made this survey before witness heard of any dispute along this line. He has been deputy sheriff ten or twelve years.

H. H. Miller (Record p. 982) said:

> "I knew an old man named Joe Graves, he was my uncle. He told me where the State line was. He said how the state line came to be run along over the Hangover and Hao. He said he was with the surveyors, as a packer, and was along with the surveyors in 1821. That they got lost. He said that they had orders to keep on the dide between what is now the water of Tel-

lico and the waters that run into North Carolina, that is the main lead, and that when they come to the ridge now called the State ridge, a dense fog came down and they made a mistake and went down what is now called the State ridge and marked the line until they came to the breaks, and saw they were lost. He means by the breaks the Tellico River, and the next morning they sent him and another man back to cut out these hacks, and that they thought it was foolishness and sat down, and that they went back and got on another ridge and made a plat of the dividing ground, and after that they just surveyed on the main lead, but never went back and surveyed around the waters of Tellico, that the bend there is to the east from Laurel Top, and that was the reason that the ridge is now called the State ridge. Graves is now dead."

The witness further states that Isaac Tate told him the same thing (Record pp. 986-7). He said he was along when the line was run, and that this was the general understanding in Munroe County, that the real line was around the headwaters of the Tellico.

Chas. Seymour (Record p. 1045) said that he knew Hoyt since 1876, met him and employed him to survey land, and that he was one of the best surveyors, most accurate and reliable. He exhibited Hoyt's maps (Record p. 1044) made before any controversy in this case arose. He exhibited grants from the State of Tennessee found in the record from 1055 to 1076. He states that he knew Joe Graves and Sol Graves, two old

men, that these men told him the story over and over, it was the one thing in their lives they thought would interest him. They said they were present at the making of the important survey, and that it was the original survey of the State line, that they were present and it was made by a large party of men, and that the party came along the Hangover, and they followed the line along the divide of the mountain at the point where the fog came on, it was toward night and they took the first turn down to get to a place to camp, where there was water, and they followed the ridge down to the river and camped for the night. The next morning, finding themselves down in a hole, they went on top of the mountain further west and sent a man back to tell the marker, who was sometimes a long distance behind them, to stop marking. They said they would plat out the mountain around as it was and would go on, and went on to the south. The Graves brothers claimed to have been with the surveyors at that time, when they were running the line between the states, between the Little Tennessee River and Hiawassee River, but that he did not discuss with them where the line ran at any point, except they told him about some marked trees at the place where the parties camped. They said they sent back some men who went around the mountain and reported the shape of it, and those men did not go in until after they passed the turnpike where the Graves left. They said it was the ridge between the headwaters of Tellico and one of the prongs, called by some, Rough, and by others, I think, Indian Creek.

Mr. Seymour exhibited a map, and also copies of grants, 22 in number, issued by the State of Tennessee. These grants embrace the land between the State ridge and the divide around the headwaters of the Tellico River, and bear date in 1842, and between that and 1845, showing that the State of Tennessee claimed this territory and exercised jurisdiction over it as of that date. There is more than ten thousand acres of this land.

John H. Howard (Record p. 1082) stated, that he knew Jack Milligan, knew him for more than forty years. When he first knew him he was fifty years of age, he heard Milligan say that the line ran over the top of the Hangover down in the Slick Rock Gap, down to the Little Tennessee River, and the line followed the main ridge from Slick Rock Gap over the Hangover.

Boyd Murray testifies (Record p. 1356) that some thirty years ago Jack Milligan told him that the state line was along and over the Hangover lead. In 1880 Isaac Carringer told him that the Hangover was the State line and pointed out a tree near the gap and said it was a line tree.

The record shows that T. E. H. McCrosky and A. M. McCrosky made entries, one dated July 28, 1883, and obtained grant upon same for five thousand acres of land, covering all the land in dispute between the State of Tennessee and the State of North Carolina in the Slick Rock Basin. Those grants refer to the state line, call to run with it, and locate it over the Hao and the Hangover and down to the Tennessee River, as insist-

ed upon by the State of Tennessee (Record pp. 1364, 1365).

The record also shows the same land was entered and granted to Griffiths and Morton by Grant No. 41,091 on September 8th, 1883. These grants were issued by the State of Tennessee.

THE JURISDICTION OF THE STATE OF TENNESSEE OVER THE LAND.

It further appears in the record that there were five or six families living on the land in dispute between the Slick Rock Creek and the Hangover, or in the Slick Rock basin. These families worked the roads, the overseers district being to the top of the Hangover, the line along this crest, that they were assessed for taxes and paid their taxes, and voted in Munroe County, in the State of Tennessee (Record p. 1352) and that the land between the State ridge and the divide, on and near the head of the Tellico River was assessed for taxes in the State of Tennessee (Record p. 1054).

The record further shows that the land between the State ridge and the divide, that is, the land east of the State ridge and west of the divide, were assessed for taxes, sold, bid in, by one Jack Stiles; that a bill was filed in the case of George P. Wetmore, et al vs. Stiles, (Record p. 1235) in Munroe County, to set aside Stiles' claim and remove it as a cloud from the title. Also that part of these lands were in litigation in Munroe County, in the State of Tennessee, in the case of B. K. Stephenson vs. Tip Lovingood (Record p. 1241).

The record further shows that the Tennessee

Legislature passed an Act creating a new County called Jones, and in setting out the boundaries of this new County included in it the land between the State ridge and the divide, that is, the land east of the State ridge and west of the divide, and ran the line of the new County along the line between the states as claimed by the State of Tennessee (Record p. 1259).

THE MAPS.

The defendant, State of Tennessee, in its testimony, in further confirmation of the location of the line, over the Hangover and the divide, introduced many maps, made exhibits to the deposition of O. Welti, who was the keeper of record in the library in Washington, many of them being Government maps, post road maps, and dated at various times. Some were made by authority of the State of North Carolina, and I think there must be more than thirty in number.

Most of these maps show the location of the State line around the head of the Tellico River as claimed by the State of Tennessee. Many of them show the line to run over the Hangover and Hao as claimed by the State of Tennessee. Reference is made to Welti's deposition and his comments thereon, which will be found in the record.

In the main, these maps confirm the location of the State line in accordance with the insistence of the State of Tennessee, especially the map of Cherokee County, North Carolina, made Exhibit FF to Williams' deposition (Record pp. 1636-7-8) and this is also referred to for its contents. There are many other maps mentioned and referred to in this evidence.

THE MAP MADE IN 1821, *EXHIBIT C TO THE ANSWER AND CROSS BILL OF TENNESSEE, CONFIRMS THE LOCATION OF THE LINE BETWEEN THE STATES OF TENNESSEE AND NORTH CAROLINA AS INSISTED UPON BY THE STATE OF TENNESSEE.*

Mr. Hale, in his testimony, (Record p. 1136) which he reduced to narrative form, explains the map of 1821. He says:

> "The map shows the line from the State of Virginia down to the Tennessee River to be on the crest of the mountain, because the mountain ridges are indicated on the map by etchings, the streams are indicated by solid irregular crooked lines, and the state line as marked here follows the etchings north of the river. It seems to be a continuous ridge from Big Pigeon River to the Tennessee River. When they reached the Tennessee River, the map shows they went directly across it. After crossing the river on the south side, it appears that at a distance of about two miles from the river they reached the crest of the ridge, which is the watershed, and a continuous ridge from the Tennessee River to within two miles of the Hiwasee River. Immediately after crossing the river it appears from the map that they followed close by the stream for something like two-thirds of a mile, and then left the stream for probably one-eighth of a mile, and then return near the stream in the next one-sixth of a mile,

and then left the stream for good, climbed to the top of the mountain, I am familiar with the topography of the country immediately at the mouth of Cheoah River, also at the mouth of Slick Rock Creek. It is very rough and mountainous in the whole neighborhood around there. At the mouth of each of the streams and above and below these streams the mountain butts down to the river, and the streams there throughout the whole section, and you cannot get away from any of these streams without climbing a mountain. The first two-thirds of a mile from the circle on the south bank, or at the south bank of the river, it is hard to determine whether or not they are following the streams or ascending the mountains (the circles on the map representing each mile beginning at the State line of Virginia and going to the State line of Georgia). However, speaking from my knowledge of the country and experience as a surveyor, I would say they were ascending the mountains. There are two leading ridges indicated on the map, the Fodderstack lead and the Hangover lead. They are shown by etchings and the lines of etchings are through each ridge. This indicates the relative height of the ridges. The Hangover and Fodderstack enclose what is known as the Slick Rock Basin. Down the river two miles below the mouth of Slick Rock Creek, there is an imaginary ridge. The Salt Spring Mountain might be tortured into fitting this ridge. It does not approach the

Tennessee River. On this map of 1821 there are several etchings and sketchings at the end. The map of 1821 shows the line crossing the Tennessee River at or near some stream, and there is no stream of any size within less than a mile of where the line crosses the river. The shape of that stream as indicated on the map would come nearer fitting the Cheoah River a mile or more above the crossing than any stream that I know of. The Cheoah River empties into the Tennessee River in approximately the same course that this stream approaches the river, and from the river a distance unknown to me, something like the distance shown on this map, it makes about the same bend eastward as this stream makes. This stream could not be construed into fitting Slick Rock Creek, because the Slick Rock Creek has nearly the same general bearing for several miles from the river going up the stream from the river, I mean to say, as a matter of fact the location of the Slick Rock Creek has about the same general bearing about five miles up stream from the river and not as portrayed on this map. Taking the calls as reported by the commissioners and this map, I should say that the line was not located by the Commissioners on Slick Rock Creek, but on Hangover lead.

"Q. On approaching the Tennessee River from the northeast you would reach a point about a mile from the river looking southward you can see a gorge where two streams approach the river from the south.

The line indicates the commissioners reached the river at a point between these two streams at a point where neither could be seen. The streams on the map indicates that they sketched the streams, that it was to the left, giving it its general trend, and closer to the line than it actually approaches." (Record pp. 1138-9-40.)

On page 1172 of the record, this same witness said:

"The map shows the line following the crest, a continuous ridge around the headwaters of the Tellico River. Removing the etchings from the map, and taking the line only, it would conform to neither of the contentions, that of Tennessee or North Carolina, but the etchings show that the line should be on the crest of the ridge, and would more nearly conform to the contentions of Tennessee.

'The ridges near the State Ridge run parallel, the Rough Ridge west of the State Ridge is nearly parallel with the State Ridge. I know what is locally known as the Unaka Mountains, and I have designated that point on my map, being a point referred to on the map of 1821. It is at the end of the call from the Tennessee River to the main ridge and along the extreme heights of same to the place where it is called the Unaka or Unicoi Mountains."

On page 1138, Mr. Hale describes the topography of the Country at the mouth of Slick Rock Creek and Cheoah River, and says:

"Just below the mouth of Cheoah River and within two hundred yards from the mouth, there is a ridge that butts off and leaves the Hangover Ridge near Sourwood Gap. It is about one mile. So that spur would be about one mile in length, extending from near the mouth of the Cheoah River to the Hangover Ridge. There is also a spur on the north side of the river that comes down to the river. In some respects it would be more convenient for a line to be run along the crest of this spur than up the Slick Rock Creek, that is especially so in crossing the river. Just below the Cheoah River is an eddy in the river in which parties can cross on a raft or boat. On the north of the river there is a spur that runs down and terminates near the mouth of Slick Rock Creek, called the Lester Ridge, which runs about southwest. I first went down the ridge searching for marks from its junction with the State ridge to the river. Then I surveyed with the river opposite the mouth of Slick Rick Creek back to the junction with the State line ridge, this ridge is accessible but there were no marks found upon this ridge. On the south side of the river the map indicates to me that they were following the top of the ridge as it does on the north side of the river. I have examined the map carefully and it appears that for a little more than half a mile the line follows close to the streams, it turns at an angle of sixty degrees to the right, or westward, and then runs something like an

one-eighth of a mile, and then turns at an angle of somewhere near seventy-five to ninety degrees to the left or eastward and runs about one-eighth of a mile, possibly a little more. It then turns at an angle to the right about six degrees and runs about one-eighth of a mile. It then turns to a very slight angle, possibly ten degrees to the right or westward and runs another one-eighth of a mile, getting still further from the creek. It then turns to an angle of about sixty degrees to the left or eastwardly and runs about one-eigth of a mile. This brings us to the crest of the ridge, there being etchings on both sides, and sloping both ways."

He then explains that the ridge west of Slick Rock Creek could not be the ridge over which this line was run, stating that the ridge westwardly to Stiff Knee cannot possibly conform to the line as indicated on this map because the angles and distances of the newly discovered map, referring to the map of 1821, follows the ridge near the crest of the ridge. There are quite a number of spurs running off from that ridge, marked Slick Rock Ridge, on this map, running southeast and terminating at Slick Rock Creek, some nearer toward the territory at Little Slick Rock Creek. It is not possible that the newly discovered map and the lines shown on it can conform to either one of these spurs. Nor is it possible for the map to conform to the ridge running from the peak at Little Slick Rock to the junction of the main ridge. It don't run in the right direction from the general course, or have

any of the angles that would extend this distance shown by the ridge.

O. W. Muller (Record p. 1270) said, when asked to state what he did with a view to locating the line taking this newly discovered map as a guide:

> "We tried as a base at the crossing of the river, and tried to fit back toward the north but we did not succeed. We tried to fit it at the crossing of the river, we started on the south side but it wouldn't work. Then we went to the mouth of Slick Rock Creek and meandered with the Creek and ran up the creek about two miles, and it was not satisfactory there, then we went to the mouth of Cheoah and ran up it and got the location of it. The map indicates that the state line runs with the top of the ridge from the shading, and it indicates that it crossed the river at right angles. North of the river the line shows the shading on the left hand side, the southeast side. It indicates that the line is on the top of the ridge, and the same thing is indicated on the south of the river. Following the ridge on the north side to the river the same shading would necessarily indicate that it was following the ridge on the south side. We went to the mouth of the river, the stream laid down on the map as a creek, it indicates that, or connects with it and runs on the east side, then the line runs on the east side of it. The line runs on the southwest side of the water courses, and on the east the shading is the same on both sides of the line

from right close to the river. It indicates that between the shading is the top of the ridge. It indicates that the ridge is followed, where the shading is shown. It runs for half a mile with no angle, this is a kind of bend here, then it turns to the right and runs perhaps forty rods, and then again turns to the left, running about the same distance, and then again to the right about eighty rods, or perhaps one hundred and sixty, perhaps half a mile. I have gone to the place where the line crosses the river with a view of examining the topography and particularly as to the ridges. From the north side to the three ridges which run from the river over the main state line ridge, the ridge from the mouth of Slick Rock Creek runs in a southwest direction, it is a little southwest. They connect finally with the Big Stack lead and reaches to what is called the Stiff Knee Gap. This is right above the head of Slick Rock Creek. Following the spur at the mouth of Slick Rock Creek around that way, it would pass Stiff Knee and Little Fodderstack and Big Fodderstack. There are other spurs and ridges between this ridge and Little Slick Rock Creek, they run from the Big Stack lead down to Slick Rock on that side. It is not possible to make the newly discovered map fit these bearings and distances along these ridges. We examined the ridges on the south side of the river and above Slick Rock Creek. From the map it would indicate that the commissioners in crossing the Tennessee

River, crossed at the mouth of the stream, but it is not possible to fit the stream and ridges on the map in the locality of Slick Rock Creek on the map. There is one stream in the locality which would come nearly answering the stream as shown on the map, and that is the Cheoah River. The Cheoah River is located with reference to where the line strikes the river on the north side a mile and a quarter above, and there is a spur from the main ridge on the north side of the river leading down toward the Cheoah River, and there is a spur on the south side leading from the mouth of Cheoah River, leading to the main Hangover lead. When I first went there, I placed the State line on the State Ridge, I connected the place where it forked and took the left hand as the most prominent spur, running down to the river. This was about 1900 feet above where we found the northwest point, the spruce pine. There was another spur that run to the right and runs lower down to the river, run down about the mouth of Slick Rock Creek. It winds down and is not a straight spur. I believe it was called Lester Ridge. Then there was a middle spur upon which we found the marked state line that runs down to the spruce pine where we crossed the river. The most prominent ridge which we could see from the north side of the river was the Hangover Ridge. It was the highest."

On page 1281, he says:

"This map shows nothing but a few

things. It shows that they run the line on top of the main mountain, on the course they crossed the Tennessee river when they came to it, that they ran above the headwaters of the Tellico River. I recognized that as the point at the junction of the Big Fodderstack and the Hangover, it is the leading ridge, and we get this idea of the leading ridge from the map of the commissioners in the report they made to the States of Tennessee and North Carolina."

See also Record p. 1370.

John L. Williams (Record p. 1414) in speaking of this map, says:

"To take the shading or alignment of the line itself, it does not conform to either the Slick Rock Creek or Big Fodderstack. To take the shading of the line alone, I think it would more nearly conform to the Hangover line, that is, take the topography shown on the map and everything else except the shading of the line it conforms very nearly to the Hangover line. The etching on the south side of the river indicates to me that there was a ridge to the right of where they went up from the river and to the southwest, which would correspond with the actual conditions going right across from the Hemlock, and right up to the top of the Hangover Ridge. That is, the Hangover Ridge goes right on down between the river and Slick Rock Creek to the mouth of Slick Rock Creek, and turns there, going directly across the river from the Hemlock, and to

the top of Hangover Ridge, the point of the main ridge is to the right and west of the line, so that would very well represent the actual conditions if they had gone right across the river from the hemlock and up to the top of that ridge. Taking the Exhibit No. 1 to the testimony of W. D. Hale, which shows a number of spurs running off to the Tennessee River there, the main ridge is shown as shown on his map goes down to the mouth of Slick Rock Creek. The spurs shown on that map, having the dotted line along the spurs is not the main Hangover Ridge. This map shows, so far as I know, the topography of the country. We went near the mouth of Cheoah to cross the river, and crossed in an eddy below the mouth of Cheoah, and then went down the south bank of the river to opposite the hemlock and went up a steep ridge or spur to the top of Hangover Ridge. The etching or hacheres on the map of 1821 shows that they were on top of the mountain from there to the southwest. If the line between the Hangover Ridge as delineated on the map, Exhibit No. 1 to Hale's deposition, it would conform to the etching as shown on the map of 1821. That is, it would be the top of the ridge, and it could not be along the line of Slick Rock Creek. That is not on top of a ridge. The map shows the line at the mouth of a stream, or very near it, and from there to the southwest it shows that the line is all the way on the west side of the stream and not near it any more except at one

point, which is shown as a mile circle, and at that point it is to the west of the stream. After passing that first mile circle it does not cross the stream. Its general trend is further from the creek. According to the scale of that map the line is away from the stream, from the stream marked Creek as shown on the map, about as near as I can calculate, it is eighty poles, or one quarter of a mile, 1320 feet. The trend is to the south of this stream marked Creek, is something less than half a mile as shown by the mile circle, showing that within a mile and a half from the river on the south side, the line depicted on this map of 1821 is at least a quarter of a mile from the stream, also depicted on that map as a creek. At a point five miles south of the river it would be two miles and one hundred and forty poles, or two and two-tenths miles from the creek, according to the scale of the map of 1821."

O. L. Williams (Record p. 977) on being shown the map of 1821, a copy of which he made Exhibit A to his deposition, says from the pine extending southeast from the river, it runs pretty much on a straight course to the Cheoah River. Of the few creeks that are in there, there are Robinsville, Tellassee and Snowbird.

"From my knowledge of that territory and streams I would call the stream laid down on the map, marked creek, the Cheoah River, because Slick Rock Creek and that other creek would not run that way. There are other creeks that are in there, but that

is bound to be the Cheoah River because I have lived there for years and have been all through there, have fished there. It makes a curve back to the south, it turns more east at Robinsville. There are a few creeks there which are not marked. From the Slick Rock Creek or mouth of Cheoah, the mouth of Cheoah is half a mile and the spruce pine on the north side is between a half and three quarters of a mile above Slick Rock and on the opposite side, and that would make it from a mile to a mile and quarter below the mouth of Cheoah River. The Tennessee River here runs practically east and west. The Slick Rock Creek comes in at right angles. The Cheoah River comes in at an acute angle."

The contentions of North Carolina that the line crossed the Tennessee River at Slick Rock Creek and ran up that creek, crossing it some twenty-nine times, as shown by the map, Plaintiff's Exhibit D, known as the Burnes and Gannett map, is wholly discredited by the commismissioners map of 1821, because it appears from the map of 1821 that the streams laid down on that map at a point where the State line crosses the Tennessee River, marked creek, is all together on the east side of the line, between North Carolina and Tennessee as delineated upon the map and it further appears, from an inspection of that map, and the interpretations given it by the expert witnesses, from whose evidence we have taken the above extracts, that the state line is all together on the west side of this stream, and that it approaches this stream at no point

closer than eighty poles, or one quarter of a mile. And even this is clearly apparent from a careful inspection of the map of 1821, so that the insistence of North Carolina that this map of 1821 shows the location of the line to be up Slick Rock Creek cannot be sustained.

On the contrary, the insistence of the State of Tennessee, that this map shows that the line crossed the river and ascends the ridge west of the creek, as explained by the expert witnesses, above referred to, is unquestionable. These witnesses go into detail, explain the topography of the country surrounding the place where the line crossed the river and showing the ridges, and then apply the map to the location on the ground, and say that in their opinion, the streams laid down on this map marked "Creek" is not Slick Rock Creek, but is the Cheoah River. They go further and say that it could not be Slick Rock Creek, not only on account of its location, but on account of the angle with which it approaches Tennessee River, and they then describe the Cheoah River and say that this river approaches the Tennessee River at an angle the creek laid down on the map is pictured to approach the Tennessee River, and they identify this creek as the Cheoah River.

This being true, it is made certain that the line crossed the Tennessee River from the fore and aft spruce pine tree and ascended the Hangover lead to its summit, and followed the crest of that lead to the junction of the Fodderstack with the Hangover lead.

The map shows that the line was run around the head of Tellico River on the main ridge as

hereinbefore described.

On the map, the Court will see that there are small circles at short intervals. These are explained by the witnesses to be mile circles, the circles were put upon the map at the end of each mile beginning with the Virginia line and going through to the Georgia line. (Record p. 1174.)

The map of 1821 shows on its face that the line was run upon the top or crest of a ridge or mountain beginning at the Virginia line and going through to the southern boundary of the state, and that this mountain is cut in two by the rivers that pass through it, such as Big Pigean River, the Tennessee River and Hiwassee River, but with these exceptions, the whole length of the line as indicated by the map, is on top or crest of the mountain. This is shown by the etchings and hachures, as explained by the witnesses.

It is further shown, and perhaps more clearly shown than any other way, by the length of the calls and the angles in the line; it appears from the face of the map that oftentimes between the mile circles there are many courses and angles. This results from the efforts made by the commissioners to keep on the dividing line or the main crest of the ridge and indicates that where the crest changed its course, the line changed with it, however short the bend in the crest of the ridge or mountain might be, and this in itself, we think, is sufficient evidence that the commissioners kept on the crest of the ridge all the way through. Otherwise, there would have been no necessity for making these short angles and curves in the line.

Mr. Hale (Record p. 1161, 1167, 1169, 1172) and Mr. Mueller (Record pp. 1299, 1300, 1301) and Mr. John L. Williams (Record pp. 1434, 1435) describes in different language, but substantially in the same way, the topography of the country in and around Tellico River, and explain the map of 1821, called the commissioners map, as applied to the land over which the line runs. They show that from the etchings on the map that the line is portrayed as passing along on top of a ridge, lead or mountain from the junction southwestwardly to the Unaka Mountains. The map shows a continuous, well defined unbroken ridge all the way between the junction and the Unaka Mountains. There are no breaks in it of any kind, and in this way shows this mountain to be the Hangover lead, the ridge called the divide or watershed and the Unaka Mountain. The map further shows by the curves in the line that it must have been traced along the crest of this ridge or lead between the Hangover and the Unaka Monutains.

The topography of the country, the ridges and creeks laid down on the map of 1821, cinches this conclusion. It shows that the headwaters of the Tellico River, and Citico Creek have their sources on the west side of this ridge and flow into the State of Tennessee, and that from the location of the ridge over which the line is traced with reference to the headwaters of the Tellico River, it shows clearly that all the other streams, the Santellah, Snowbird and Buffalo, and other creeks mentioned in the record, flow to the east into the State of North Carolina,

making it absolutely certain from the map of 1821 that the line between the two states was run and located by the commissioners along the ridge here called the divide, around the headwaters of the Tellico River, and these facts absolutely refute the contention of North Carolina that the line was along the crest of the State ridge to its termination, and then crossed the valley between the State ridge and Jenks Ridge something like half a mile wide and thence up Jenks Ridge to Jenks Knob, where it joins the main ridge. If it ran with the line as here indicated, it would cross the main stem of the Tellico River at a place where it is sixty-six feet wide, and would also descend from the State Ridge and traverse the valley through which the Tellico River flows before ascending the Jenks Ridge.

The map of 1821 not only does not show that the line crosses the Tellico River, but it shows that it did not cross the Tellico River, but turns to the east, then south, then southwest, going around the headwaters of the Tellico River. Now, we insist that the map of 1821 locates the line between North Carolina and Tennessee in precise accordance with the contention of Tennessee, both at the crossing of the Tennessee River at the head of Tellico River.

The map shows that beginning at the fore and aft pine on the north bank of the river it is run immediately across the river, to the main ridge, as provided in the cession act and the commissioners report and the confirmatory acts of the respective states. Thence along the extreme heights passing over the Hangover, the Hao,

the Stratton Bald and on down to Laurel Top, thence around the headwaters of the Tellico River to the Unaka Mountains, and that this map having been referred to and accompanying the commissioners report, became a part of it, and in connection with the report, the cession act and the confirmatory acts, furnishes such a complete and full description of the location of the line as cannot now be contradicted, comprising as they do the whole of the record evidence of the location of the state line.

In the case of Bell vs. Hickman, 25 Tenn., (Humph.) 397, it is said;

> "Special and locative calls usually control calls which are merely general and directory, and no accumulation of the latter can vary the application of the principal; but the grant may refer to something extrinsic, as to the plat and certificate of survey which accompanies, or is annexed to it, which sall have, not a directory, but a locative operation in determining its precise limits; and, therefore, although the special calls would carry the lines across the river and would prevail over the directory call for one side of the river, yet if the plat and certificate referred to by the grant represents the land as lying on one side of the river, this will have the effect to fix the plat in that manner."

In M'Ivers vs. Walker, reported in 9th Cranch, p. 173, 3rd Law Edition, page 694, the Court said:

> "If a patent refer to a plat annexed, and

> if in that plat a water course be laid down as running through the land, the tract must be so surveyed, as to include the water course and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey nor the patent calls for that water course."

This case is also reported in 4th Wheaton, p. 442, 4th Law Edition, page 611, where the same head notes appears.

As we have seen the map of 1821, shows the line as laid down upon that map, as surrounding the headwaters of the Tellico River, and it does not show on that map that the line crosses the Tellico River at a point where the same is sixty-six feet wide. And it also appears on that map as hereinbefore explained, that at the crossing of the Tennessee River, the line is shown to run a quarter of a mile west of a stream which is not named, but which we have demonstrated as we think, was Cheoah River, and that the line does not approach this Creek or stream or river at any point nearer than a quarter of a mile. The map does not show that this line crosses this river at any point, much less twenty-nine times, within five miles, as insisted upon by the State of North Carolina.

It is therefore, clearly demonstrated that this map in no way conforms to the location of the line insisted upon by the State of North Carolina, but on the contrary that it conforms to the line as insisted upon by the State of Tennessee.

When Judge Lurton delivered his opinion in the case of Belding against Hebard, reported in 303 Fed. Rep. 532, he did not have before him this map, it not being a part of the evidence in that case at that time. But independent of this additional evidence in summing up the arguments in favor of the location of the line along the crest of the Hangover and Hao and the divide, as contended for by the State of Tennessee, he said:

> "It is admissable, in locating a line, where a difficulty exists in identifying monuments, natural or artificial, to run the line in a reverse way, if thereby doubts may be better solved. 'The footsteps of the original surveyor may be traced backward as well as forward.' Ayers vs. Watson, 137 U. S., 584, 590, 34 L Ed. 803; Coal Company vs. Doran, 142 U. S., 417, 35 L. Ed. 1063. So any ascertained monument may be adopted as a starting point, where difficulty exists in ascertaining the lines of a survey as actually run. Heirs vs. Watson, 137 U. S., 584, 34 L. Ed., 803. We have two established points in the line as actually run by the commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee River, and the other is some eight miles southwest from that tree, being the well marked line on the heights of Hangover, where a junction is made with the Fodderstack Ridge. If we reverse the survey, and take this junction of the two ridges or

leads, as they are sometimes called, as a strating point in running backwards, one cannot doubt but that the line should follow the Hangover to the river. The Fodderstack Ridge would not be observed by surveyors who had reached that point by following the highest ridge from Unicoi or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abondan the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee River would not be reached at all but by again diverging and following one or the other of two lateral spurs, this situation is most plainly shown by the map of appellees, adopted by the master, as correctly showing the general course of the ridges or leads at the locality in question. This map is here shown upon a much reduced scale.

"If the joint commissioners obey the call to follow the highest mountain top and adhered to the course pointed out in the cession act, they undoubtedly located the line on the Hangover, and if we followed the line which they reported and adopted, whether we endeavor to track them backward or forward, we must conclude for the call for the "main ridge" and "along the extreme heights thereof" in the act adopting their survey, that they did in fact lo-

cate the line on the Hangover, between the river and the junction of the Hangover, and the Fodderstack. The Hangover is undoubtedly the "main ridge" called for in the survey made by the commissioners, and definitely locates the line, unless there appears such definite and positive evidence of another and different location of the line as to justify us in finding that the line as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the direction of the cession act, and so also every presumption, that the line was actually run, marked and adopted, was a line which conforms to the calls to follow the extreme heights of the "main ridge" from the Tennessee River to Unaka."

CONTENTION OF NORTH CAROLINA.

The State of North Carolina says that she has shown a well marked line from the fore and aft tree on the north bank of the river, conceded to be in the line, down the north bank of the river to a point opposite the mouth of Slick Rock Creek, thence crossing the river, the marked line following the Slick Rock Creek for something like five miles, having crossed it twenty-nine times, and thence up a spur of the Fodderstack, connecting that ridge with the ridge at the peak called Little Fodderstack, and from the top of the Fodderstack south along its summit to its junction with the Hangover.

The State of North Carolina then invokes the principle that lines run and marked at the time of the original survey upon which a grant is issued, and made at the execution of the deed, if found constitutes a true boundary which must not be departed from or made to yield in favor of less certain and definite calls.

Cook vs. Brumley, 11 Wallace, 659, 20 L. Ed.

McIver vs. Walker, 9 Cranch, 173, 3rd L. Ed., 694.

Clement vs. Parker, 125 U. S., 209, 31 L. Ed., 721.

But in order to make a marked line controlling it must be found and identified.

Schenowech vs. Harper, 3rd Peters, 92, 7 L. Ed., 614.

The best statement of this principle that we have found anywhere, was by Chief Justice Gaines, of the Supreme Court of Texas, in delivering his opinion Phagan et al vs. Stoner, et al, 57 Texas, 286. He said:

"When a marked line is called for in a grant,it is only when the line can be identified on the ground as the one made by the surveyor, that it will control, a call for course and distance. *The law does not require the distance claimed in the field notes of a grant, to be greatly extended to reach a line merely because it is found on the ground with marks corresponding with age and with date of the grant.* He who claims the right to so extend the distance and give superior dignity to the marked line, must show that the line was the one marked on

the ground by the surveyor preparatory to the issuance of the grant."

The North Carolina cases are in accord with this Texas case.

In Elliott vs. Jefferson, 133 North Carolina, 207, and reported in 64th L. R. A., 135, the Court said:

"For many years, we have in all cases except one, adherred to the description contained in the deed, and it is much to be lamented that we do not all together. The case to which I allude is where the deed describes the land by courses and distances only, and old marks are found corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they will be supposed to have been made for its boundaries, the marks shall be taken as the termini of the land. This is going as far as prudence permits, for what passes the land not included in the description in the deed, but included only by the marked termini? Not the deed, for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the termini of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or rather supposed that the

courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed, or by the marked termini."

The Tennessee authorities are to the same effect. In Massengill vs. Boyles, 4th Humph., 205, the Court said:

"Parol evidence is not admissable to control the description of the land in a deed or grant, unless monuments of boundary were made at the time of the execution of the deed or grant; and, therefore, before a line run according to course and distance can control a call for natural objects, it must not only have been traced by the compass, but must have been marked and fixed by the surveyor as the boundary, and must be proven to be the line on the trial."

In Martin vs. Nance, 3 Head, 650, the Court said:

"To control the description of land in a deed or grant, it must be shown that monuments of boundary were made at the time of the execution of the deed, or grant."

The Court in delivering its opinion, said:

"There was some evidence of an old marked line along the bank (of the river), but it seems to have been regarded by the jury insufficient to establish the line."

The case of Massengill vs. Boyles, 4 Humph., 205, holds that to control the description in a deed, or grant it must be shown that the monuments of boundary were made at the time of

the execution of the deed or grant. The evidence of Hogan, the surveyor, fell short of that in this case. He only proved that there were marks on the bank, without fixing their age with any precision.

In Staub vs. Hampton, 9 Cates, 734, the Court reviews all of these authorities and speaking with reference to the case then on hand, said:

> "A purchaser is entitled to the land actually surveyed, provided the lines and corners can be established and identified as having been actually run and made at the time of the sale, and course and distance must yield to what is proven to have been the actual survey;" and citing many cases.

The marked line insisted upon by the State of North Carolina as laid down and described upon the map made Exhibit AA to the deposition of John L. Williams. This map is a copy of the map made by Mr. Burns. It shows that the line insisted upon begins at the pine, a fore and aft tree on the north bank of the Tennessee River, which is conceded to be in the State line, and then proceeds down the river for half a mile to a point opposite the mouth of Slick Rock Creek, thence up the creek to the spur of Fodderstack, then up the spur to the crest of Fodderstack, and thence around to the junction of the Fodderstack with the Hangover ridge. It then proceeds southwestwardly along the line admitted to be the true line by both states, to the place called "County Corners" marked on the map, or Laurel Top. It then proceeds down the State ridge and across the valley between the State ridge and

Jenks ridge thence up to Jenks Knob, the Point where Jenks Ridge forms a junction with the main dividing ridge. On this map is set out and located each marked tree to which the Court is referred.

The evidence in the case shows that many of these trees set out and shown on this map as marked state line trees, are not in fact state line trees marked by the commissioners in 1821, but that they have been marked with state line marks since that time by other parties. There are a few of these trees, however, that the evidence shows were marked with state line marks of sufficient age to have been made in 1821, the date of the running of the line by the commissioners. There is also evidence in this record to show that this marked line is along trails supposed to have been made by the Indians, and called in the record, Indian trails, and there are state line marks along these trails crossing the ridges at other points, especially on Big Fodderstack near Stiff Knee and Lone Pine, which are not claimed to be along any line, and yet these trees are marked with the same character of marks as the marks appearing on this line, being state line marks. (Record 1214).

The claim of North Carolina, that on the north bank of the river they found a chestnut oak marked as a fore and aft tree, known in this record, as Tree No. 30, which was marked with state line marks, and which Mr. Gannett and Mr. Burns blocked and testified that the anular rings indicated that the marks were made in 1821, cannot be sustained.

After their evidence was introduced on this

subject, Mr. W. D. Hale, John L. Williams and Mr. McNabb (Record pp. 1132, 1527, 1442.) visited this tree and again blocked it (Record p. 1683) and each of them preserved a section of the block, brought it in and exhibited the sections in their respective depositions in this case. These blocks fitted together show that they were a part of what was once a larger block. An inspection of these blocks shows that this tree was not marked with state line marks, that it was marked with four hacks and not two hacks; that each of these four hacks disclosed the fact that it was made something like eighty years ago, but that the blaze upon the tree was not as old as the marks,—the blaze was only fifty-eight years old. This fact was ascertained from the anular rings as applied to the markings above recited. So these witnesses clearly demonstrate that this chestnut oak tree, No. 30, was not a state line tree. There was no other tree on the north bank of the river that was identified as a state line tree, or that is now seriously insisted upon as marked with the state line marks.

Coming now to the line along the State ridge, and along Jenks ridge, claimed by North Carolina, as hereinbefore discussed; there is but one tree on that line that is claimed to be sufficiently identified to be marked with the state line marks, and that a holly, known in this record, as the 886 Mile Tree. The tree apparently marked with an 8 and a 6 and an M. These marks had been very much mutilated so that they could hardly be recognized. This is the only marked tree, marked as a state line tree between the

"main ridge" along the State ridge and over Jenks ridge to Jenks Knob. This tree is described by Mr. Hale, as follows: (Record p. 1165).

> "It was from sixteen to eighteen inches in diameter. One side of the tree was dead and it was beginning to decay. Holly is a wood that decays fast, and if there was any wood there now, as last winter, I could pick it out with my fingers. You might say it was a hollow tree. The west side of the tree, when I was first there in 1896 was dead with the bark cut off. The north side of the tree had some cuts or marks that would represent the left hand leg or inner point, the two inner legs of the letter M, and the right hand leg of the letter M was gone. At the figure 8 under the letter M, and a part of what would be called the figure 6, but the bulge at the right hand side of the figure 6 was gone. The curve was the lower part of the letter M with the bark that was gone. A complete M and complete 6 was not on the tree."

This tree is subsequently described in the same way by Williams, (Record p. 1435), and by Mueller, (Record p. 1197).

The mutilation upon that tree is probably explained by the facts detailed by Joseph Graves and Sol Graves to H. H. Miller and Chas. Seymour and by Levi Mashburn to John W. Stratton, as hereinbefore quoted to the effect that in 1821, when the commissioners reached the junction of the State ridge with the main divide, instead of turning to the left and going around

with the main divide, they went down the State ridge, crossing the Tellico River, that they got lost in the fog, but when they reached the river they discovered their mistake and that they sent some parties back, especially Joe Graves and Sol Graves, to destroy the marks along the line on the State ridge, and evidently, if this tree was ever marked as a state line mark at all, it was probably mutilated at the time by these parties. So that we have no reliable evidence establishing a marked line from the fore and aft tree to a point opposite the mouth of the Slick Rock Creek, nor have we any reliable evidence establishing a marked line along over the crest of the state ridge, for when you destroy the two trees, No. 30 and the holly tree, 86 Mile Tree, it leaves no sufficient evidence establishing a marked line. There would be no connection whatever between the line admitted to be the State line when it reached the fore and aft pine on the north bank of the river and the mouth of Slick Rock Creek, and no evidence whatver to show that the line ran along on top of State ridge or Jenks ridge.

BUT THE PLAINTIFF HAS WHOLLY FAILED TO IDENTIFY THIS LINE AS THE LINE RUN AND MARKED BY THE SURVEYORS IN 1821, *AND ADOPTED BY THEM AS THE LINE BETWEEN THE TWO STATES.*

In the case of Belding vs. Hebard, 43 C. C. A., p. 303, Judge Lurton, discussing this question, said:

> "To support this contention appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodderstack ridges they show 41 trees marked as state line trees, and from this circumstance they contend that this was the line actually marked by the commissioners, and adopted by them as the line, and that the calls for course and the "main ridge" must yield to the actually marked line. That the commissioners marked the line run by them is made clear by the existence of a marked line over those parts of the undisputed line on either side of the place in dispute. The North Carolina act of 1821, adopting and confirming the survey of the commission, concludes with the words "the whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree." These words of description do not appear in the Tennessee Act of 1821, and neither the original report of the commissioners nor the surveyors field notes are in existence. The marked trees on this line are shown by

blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and a half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up a spur leading to the Fodderstack, but from the junction of the spur with the Fodderstack to the Hangover only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission. For what purpose? Is the question. Their evidential value as establishing the actual state line is greatly impaired by the following circumstances: (1) The line thus marked is not upon the course which is called for by the survey as reported and adopted. (2) It departs from the line of the "main ridge" called for in the commissioners survey, and a natural monument of the utmost significance. When a monument, natural or artificial, is called for, and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground. But in this instance

there was no reasonable doubt as to the identity of the "main ridge" called for in the commissioners survey. The greater altitude of the Hangover ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover, and not the Fodderstack, was the "Main Ridge." It is therefore, not a case of ambiguous calls, or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for in the cession act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodderstack ridge as the "main ridge" and undertook to reach it by a line up the creek. (3) If we adopt the Slick Rock Creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, following the river for half a mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line. (4) We must also believe that, instead of following a mountain boundary, which, according to the cession act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges, and followed a water course from its mouth for seven miles, and yet made no mention of

this natural object in their report whatever. (5) The significance of these trees as marking the state line is also affected by the fact that other trees similarly marked are found on Fodderstack ridge, which, confessedly, are not upon any line now claimed as the actually located state line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the Hangover line as the one indicated by the cession act, and the report made accordingly. (6) But the significance of the marked trees on the Slick Rock Creek line is also weakened greatly by the fact that two, and possibly three, old marked state line trees are found on the Hangover line. One of these trees is a black or red oak, and the other a sourwood. These trees stand on the summit of the Hangover ridge. The question as to whether they bore the proper marks for state line trees marked in 1821 was much controverted."

The Judge concludes this part of his argument, in the following language:

"We have then two lines run and marked. One is the better marked, possibly because it passes through more timber, and timber better adapted to carry the marks than the

other, which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence were scrubby and scarce. The other line though more scantily marked, is found just where the course and natural monuments called for in the report of the survey would locate the line, if neither had been marked. That the line ought to run on the extreme heights of the Hangover ridge from the Tennessee River to the Unaka Mountain, if the calls of the confirmatory boundary acts of both states are to control, is most evident."

It is, therefore, very clear that there is a wide difference between the location of this marked line on the ground as shown by the map made exhibit to Burns deposition, a copy of which is also made exhibit AA to the deposition of John L. Williams in this case, and the location of the true line, according to the description given in the cession act, and in the commissioners report and the confirmatory acts of the legislatures. From the pine, conceded to be in the line, on the north bank of the river, the call in the commissioners reports and confirmatory acts, is thence to the "main ridge" and along its extreme heights to the Unaka Mountain. If this alleged marked line is adopted, it would be, thence down the river in a northwest course, to a point opposite the mouth of Slick Rock Creek, and thence across the river and up that creek, etc. Here is a total reversal of the general direction of the line from a southwest course to a northwest course. The line runs down the river bank, a natural object, for half a mile. This is not mentioned in the report of

the commissioners. It then crosses the river to the mouth of the creek, another natural object which is not mentioned in the commissioners report. It then runs up the creek for five miles, or about that distance, crossing it twenty-nine times, and this is not mentioned in the commissioners report. It then goes up Fodderstack and along the crest of Fodderstack, and this is not mentioned in the commissioners' report.

In McIvers vs. Walker, reported in 9th Cranch 173; also again reported in 4th Wheaton, 442, 4th L. Ed. 612, in commenting upon a situation of this kind, Chief Justice Marshall said:

> "The call in the lines of the patent to cross Crow Creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause. That the lands should not be described as lying on both sides of Crow Creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the court in deciding whether there is any other description given in the patent of sufficient strength to control the call for course and distance."

The principal laid down in Elliott vs. Jefferson, and Phagan vs. Stoner, is, that in order to identity a marked line as the line described in a deed or grant, that the course and distance of the marked line must conform to the course and distance in the grant, and the court will not extend the line in order to complete such identification.

In this case the evidence shows that there are

marked on the ground, a greater number of courses, and a greater number of corners than are called for in the Cession Act and the commissioners report. That the courses of the line on the ground are not in the same direction, and on different degrees than the courses called for in the cession act and the commissioners reports. That many of the courses marked on the ground are materially shorter than the courses called for in the commissioners reports, that some of them are materially longer than the courses described in the commissioners reports. It is also seen that the artificial objects along the line as marked on the ground indicating its location, such as corners and side lines, are altogether different from the natural monuments in the Cession Act and the commissioners reports. Under conditions of this kind, identification is practically impossible. These facts show that the marked line is one line, and the line described in the cession act and the commissioners reports is another and altogether different line.

REASONABLE CONFORMITY.

In Tennessee, the doctrine of reasonable conformity was first announced in the case of Williamson vs. Buchanan, 2nd Tenn., 278, it is said:

> "That where the original lines of a grant were never surveyed, or where the grant had been surveyed, but the marks were lost or destroyed by time, that a new survey would be presumed to be a retracing of the original lines."

This case was reviewed in Garner & Dickson vs. Norris, 1 Yer. 67, where it is said:

> "That a new survey to be evidence of the original survey requires two conditions as necessary to its existence. First, that the old survey be in reasonable conformity to the grant, and second, that no original survey could be proven to exist elsewhere."

Here we have to deal with both these conditions, first, we have shown that the marked line on the ground, as claimed by North Carolina is not identical with the line described by the commissioners in their report, and not in reasonable conformity with the line therein described, and secondly we have shown that there is a marked line elsewhere, not only marked with artificial marks on the trees, but marked with natural monuments called for in the commissioners report. Beginning on the north bank of the Tennessee River and going through to the Unicoi Mountain.

The case of Williams vs. Buchanan, 2 Tenn., 278, and the case of Garner & Dickson vs. Norris, 1 Yer. 67, were reviewed in the case of Davis vs. Smith, 1 Yer. 498, where the Court modified the holdings in those cases and announced that—

> "The doctrine of remarking has been settled rather on the foot of an agreement as to boundary and estoppel to claim beyond the line newly marked than upon the presumption of renewing old marks."

And in Houston vs. Pillows, 1 Yer. 402, it is said:

> "Whenever we place the remarking on the foot of an estoppel, as in Clark vs. M'Elhaine, the true ground unquestionably, a positive rule of law applies, that the estoppel is mutual and binds both parties to the grant."

These cases are all reviewed in Riggs & Pritchard vs. Parker, Meigs 43, where it is held:

> "If granted land not originally marked by the surveyor, or the marks have become obliterated or obscured, but afterwards marked or remarked in reasonable conformity to the calls of the patent, such marking operates as an estoppel, precluding the parties from claiming the land not included in the newly marked lines."

It is said in Corruthers vs. Crockett, 7 Lea, 91, that the court have not defined the meaning of "reasonable conformity," but we call your attention to the following cases where it is held that the lines were not run in reasonable conformity to the grants:

In Elliott vs. Jefferosn, 133 N. C. 207, 64 L. R. A. 135, where the court held that the lines of the grant and the marked lines on the ground must correspond as to the courses and distances, and to the case of Fegan vs. Stoner, 67 Texas, 286, where it is held that although the marked line may be of the same age as the original grant, the court will not extend the distance to reach the line, merely because it is found on the ground with marks corresponding in age with the date of the grant, and to Woodfolk vs. Cornwall, 1 Head, 272, where it is held that if the beginning

corner of the marked line is 100 poles east of the corner called for in the title papers, it is not in reasonable conformity. And to Security Land & E. Co. vs. Burns, U. S., 168, 48 L. Ed. 662, where it is held that if the line is a half mile from the place where it is really called for, it would not be in reasonable conformity to the original grant.

The term "reasonable conformity" is but another expression for identity. If the line found marked on the ground is materially different in any respects from the line described in the cession act, then it is not identical with that line, nor in reasonable conformity with it, and in order to bind the State of Tennessee it must be placed upon the principal of estoppel, and we insist that the grounds laid for estoppel on the part of North Carolina are wholly insufficient, as we shall hereinafter attempt to show.

THE MAP OF 1821.

It is further claimed by the State of North Carolina that the map of 1821, identified the marked line as the line run by the commissioners, and adopted as the state line, the map accompanying the report made by the commissioners, and being a part of the same.

But we have demonstrated, we think, beyond any reasonable doubt, that the line laid down on the map is another complete and different line from the alleged marked line up Slick Rock Creek, and we refer the Court to our preceding argument upon this question.

PAROL EVIDENCE.

Again, it is insisted that the State of North

Carolina has shown that this line was originally run down the north bank of the Tennessee River and up Slick Rock Creek by parol testimony introduced in the case; and especially witnesses who purport to detail conversations had with Col. Tatham and one Dr. Patten, and other witnesses detailing conversations with other parties claiming to have had conversations with old citizens, and that in each and every instance these old citizens said that the state line run up Slick Rock Creek, and some of them testified to conversations had as above stated with Col. Tatham, who claimed that he was along at the time the line was run, and that it was run up Slick Rock Creek.

Exception was made to the competency of this kind of testimony on the ground that it was mere heresay; that these witnesses detailed what purported to be conversations they had had with third persons, who said or told them, that they were along when the line was run, etc.

It was admitted that subject to some qualifications it is the general rule that upon questions of public or private boundaries, the declarations of the chief surveyor or their assistants in respect thereto, as for example, in respect to locations of corners or lines, are admissable in evidence. This is certainly the rule in Tennessee.

Lannum vs. Bank, 4th Haywood, 123.

Montgomery vs. Liscomb, 105, Tenn. 148.

But in order to make such declarations of a chief surveyor evidence in Federal Court, it must be made to appear that he had actual knowledge of the facts whereof he spoke to the witness.

Hunnicut vs. Peyton, 102 U. S. 363, 26 L. Ed. 119.

Martin vs. Fulgar, 15 Cal. 280.

Russell vs. Hunnicut, 70 Texas, 69.

And the declaration must have been made when the surveyor and the witness who testifies thereto were on the land and the former was pointing out or marking the boundary, or discharging some duty relating thereto, and unless so made, the declarations are not admissable.

Hunnicut vs. Peyton, 102 U. S. 364, 26 L. Ed. 119.

Martin vs. Hughes, 90 Fed. Rep. 632, 33 C. C. A. 198.

Elliott vs. Pearl, 10 Peters, 412, 9 U. S. L. Ed. 475.

The declarations when made under these conditions become parts of the *res gestae* and consequently competent evidence. But the mere general declarations of the citizens to witnesses without having any connection whatever with the running or marking of the line in this country, we insist, is wholly incompetent.

WILLIAM DAVENPORT'S FIELD NOTES.

But it is insisted by North Carolina that this marked line up Slick Rock Creek has been further identified by the field notes of one William Davenport, one of the alleged surveyors who was along with the commissioners when they surveyed the line in 1821. It is shown that William Davenport is dead, that these alleged field notes were found in his secretary, that is in a small receptacle or bureau, in which he kept his val-

uable papers, and that this bureau, in the course of time, passed down to his grandson, one W. D. Jones, who testifies that he found these field notes therein, and that he had copy of same and presents them as part of the evidence in this case. They will be found in the record on page 634.

The witness, Jones, testified (Record p. 630) that these field notes were partly in the handwriting of William Davenport and that they were partly in the handwriting of his wife, and set out and identified that part of them in the handwriting of the husband and that part in the handwriting of the wife. When this fact was disclosed, the attorney general for the State of Tennessee interposed an exception to the competency of the testimony in the following language:

> "The State of Tennessee, through her Attorney General, further excepts to the copy which has been exhibited in this case of the book claimed to be William Davenport's field notes, for the reason that it is apparent from the statements of the witness in connection with said book, that the same was not a record made contemporaneously with the transaction, but if made by Davenport at all, was made by him subsequent to said transaction, and is in no sense a part of said transaction."

We insist that this exception should be sustained and that these alleged field notes, if made by Davenport, were made after he returned from his survey, and they were merely the verbal declaration reduced to writing by him subse-

quently, and were no part of the *res gestae*, but merely historical recitations of what took place on the survey.

The theory upon which the field notes of a surveyor are admitted as evidence at all, is upon the theory of declarations made contemporaneously with the work being done upon the ground, and these field notes must be authenticated in some way and, by other evidence, than the mere subsequent declaration of the surveyor himself.

> Collins vs. Clow, 222 Penn. State Rep. 472, and reported and annotated in 15 Am. & Eng. Annotated Cases, p. 871.

These field notes are not authenticated by anybody. The only evidence touching them is the testimony of W. D. Jones and Mrs. Cilly. The only attempt at authentication at all, is the evidence of these two witnesses identifying the handwriting of William Davenport and the handwriting of his wife in the little book, a copy of which is offered in evidence, as the field notes of William Davenport.

We insist, therefore, that the Davenport notes are not authenticated and are incompetent for any purpose.

But if the Court should be of the opinion that the Davenport notes are competent evidence in this case and can be looked to in the location of this line, we call the Court's attention to the map made exhibit AA to the deposition of John L. Williams, filed in this case. This map represents the lines run in accordance with the Davenport notes, beginning at the pine north of

the river and running southwestwardly to a point southwest of the Unicoi Mountain. The correctness of this line, as located on this map by these notes is shown by the evidence of John L. Williams and W. D. Hale, and these witnesses show a grasp of the facts in this case, and have so intelligently set forth the conditions surrounding these surveys, that forces conviction. They show that a line run by these Davenport notes does not correspond in any way with the line claimed by the State of North Carolina, from the fore and aft spruce pine down to the mouth of Slick Rock Creek and up that creek, nor does it correspond with the marked line claimed by North Carolina to be over the State ridge and Jenks ridge, but it is a wholly different and distinct line as shown by the map, not corresponding in its course and distance with any other line claimed by either North Carolina or Tennessee. And it is further shown in the evidence of these witnesses that the platting of this line on the map by Mr. Gannett and Mr. Burns, is wholly incorrect. That Gannett and Burns, in order to stay on top of the ridge, and in an endeavor to make this line correspond with the line delineated on the map of 1821, actually reversed the calls in the Davenport notes in order to keep on top of the main divide. It is not intimated, of course, that this was corruptly done, but it was thought by these two surveyors, that the intention was to run the line along the crest of the mountain, when, to follow the course in the Davenport notes the line would descend from the top of the ridge and zigzag backward and forward across it, as shown by the Map AA,

and for this reason they reversed the calls in the notes.

The evidence offered by the field notes of William Davenport can have but little force or effect in determining the location of this line. Mr. Davenport was the same William Davenport who represented the State of North Carolina as the surveyor in running and marking the line. He is the same William Davenport whose name appears on the map of 1821, made Exhibit to the answer and cross bill of the defendant, the State of Tennessee. It appears on this map that Robert Armstrong was a surveyor representing the State of Tennessee.

Now, it is presumable that inasmuch as Armstrong and Davenport were the surveyors, that they made this map under the direction of the commissioners, and that they furnished the description to the commissioners of the line actually run and located by them, and that the commissioners incorporated this same description in their reports which they made to the Legislatures of the States of North Carolina and Tennessee respectively, and which reports were ratified and confirmed by the respective Legislatures.

There are two lines. One is said to be a marked line on the ground, and the other is the marked line described by the commissioners in their reports, which was confirmed by the Legislatures. The question is, which one of these lines was adopted by the commissioners as the true line? On the one hand we have the cession act which describes and locates the line on the ground. This cession act prescribes that the line

shall be run along the extreme heights of the mountains. Then we have another act of the Legislatures of North Carolina and Tennessee respectively, appointing these commissioners to run the line, limiting their authority to the running of the line agreeably to the true intent and meaning of the cession act. Then we have the report of the commissioners, and they say in that report that they ran it and located and marked it agreeably to the cession act, and in describing that portion of the line in dispute, they say they begun at the pine, a fore and aft tree, thence to the main ridge and along its extreme heights. And this is the line that they reported, and the respective Legislatures of North Carolina and Tennessee confirmed and adopted said line. The extreme heights of the mountains called for by the cession act and the main ridge called for by the report to the legislatures, and also the confirmatory act, have been identified and are located on the ground, so there can be no question whatever now, of the location of this line and its adoption by the commissioners and by the States.

Now, the only evidence offered by the State of North Carolina to show that the marked line was the one actually adopted by the commissioners, is the verbal of parol evidence heretofore alluded to and the alleged field notes of William Davenport.

We insist, therefore, that parol evidence and the evidence furnished by these field notes cannot be received to vary or contradict the written report made by the commissioners as to which

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of the two lines they ran and adopted as the state line between the states.

If there was ambiguity on the face of the report or any such ambiguity is presented when it comes to apply the description of the line furnished by the report on the ground, parol evidence may be resorted to to describe the conditions surrounding each line. It would then be for the Court to say which one of the two lines on the ground conforms to the description in the cession act and in the commissioners reports.

But, as we have seen, there is no ambiguity on the face of the report and no ambiguity is presented when applying the description furnished in the report to the ground over which the commissioners located the line.

In Bishop vs. Arnold, Peck 366, the Court said:

> "When the consideration of questions of boundary first came before the Court, it was with difficulty that they could bring themselves to depart from the calls of the grant, under the rule that parol proof should not be received, to add to, or detract from a written instrument, and the law to this day is, if the grant is intelligible on its face, it must not be departed from."

In Staub vs. Hampton, 9 Cates, 725, the Court said:

> "The rule is general, of course, that a written instrument cannot be varied by parol evidence, but this rule has no application to a latent ambiguity. Do the facts in the present case exhibit an instance of

a latent ambiguity? We think they do. It is true, on the face of the deed, alone and distinct, apart from the inquiries into the facts which it implies and necessitates, no question arises, but when these necessary inquiries are made, an ambiguity at once starts forth."

The Court then sets forth the facts disclosing latent ambiguity, and says:

"It was competent to introduce evidence of these facts to show what the parties meant when they referred to the Brown entry and thereby to lay down on the ground the description contained in the deed."

In Reed vs. Prop. Locks and Canals, 8 Howard, U. S., 287, 12 L. Ed., 1077, it is said, quoted and approved by our Court, in 9 Cates, 740:

"It cannot be doubted that where a deed is indefinite, uncertain or ambiguous in the description of boundary of the land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is the true one, unless the contrary be clearly shown. The difference in applying the descriptive portions of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony, must necessarily be solved in some way."

In Broadman vs. Reed and Ford, 6 Peters, 325, 8 L. Ed., 422, the Court said:

"The meaning of the parties (meaning a

grant) must be ascertained by the tenor of the reading and not by looking at a part of it and if the latent ambiguity arises, may be explained by parol evidence."

On the other hand, in Lowndes vs. Hightower, 153 U. S., 191, 38 L. Ed., 619, the Court said:

"If the language in the description of boundary is clear, that should control, and should not be narrowed and limited by any mere ambiguity in the subsequent statement of the appurtenances to the grant."

"Or, to state the proposition in another form, whenever we are considering the matter of boundary, we naturally turn to the words by which the boundary is described and accept those words as controlling."

In State vs. Nashville, 2 Cooper's Chanc., App., 75, Chancellor Cooper uses this language:

"But on two points all the judges are agreed, even in that class of cases, first: That if the terms of the deed be clear, no evidence *aliunde* is admissable; and secondly, that the evidence in any case is only admissable to enable the court to construe the terms of the deed."

In Johnson vs. Kellog, 7 Heisk., 262, Judge McFarland said:

"In such cases, the parol evidence thus resorted to is not to introduce any new or additional evidence as to the terms of the contract, but simply to ascertain if their land be known by the name or description

given in the writing and where that land is. Parol evidence may apply, but not supply a description."

Snodgrass vs. Ward, 3 Hey, 40.

Waetherhead vs. Sewell, 9 Humph. 272.

Dougherty vs. Chestnut, 96 Tenn., 1.

We insist, therefore, that inasmuch as the language of the cession act, and inasmuch as the language describing this line in the report made by the commissioners and the confirmatory acts of the legislatures is plain and clear and intelligible, on the face of each of these instruments, and inasmuch as there is no ambiguity when it comes to applying these descriptions to the external objects found on the ground, then parol evidence cannot be received to change, or vary the descriptions of the line, or fix the location of it at another and different place from that fixed by these several instruments, or to show that the commissioners adopted another and different line from that described in their report and in the confirmatory acts of the respective Legislatures.

ESTOPPEL.

The record discloses the fact that the line now in dispute between North Carolina and Tennessee is located and passes over and through what was once known as the Indian territory, that is, the territory reserved for the exclusive benefit of the Indians. This territory was ceded to the United States as hereinbefore explained. That part of it lying in North Carolina was ceded by the United States to the State of North Carolina and that part situated in Tennessee was

ceded by the United States to the State of Tennessee. After this was done, that part of it situated in the State of Tennessee was constructed into a land district known in the record as the Ocoee Land District. The State of Tennessee, after this was done, passed an act requiring that portion of this land known as the Indian territory, or Ocoee District, to be laid off into sections. To that end, it appointed an official known and described in the record, as the Surveyor General, and this official proceeded at once in the discharge of his duties and began to lay off, and laid off the greater part of the Ocoee District into sections. But for some reason, not explained in the record, the Surveyor General, in laying off this district into sections, went as far east, and no further, than the Slick Rock Creek, and bounds parts of sections on this creek, but did not, in his description of these fractional sections, where bound on the creek, call for the State line, and gave no explanation as to why he didn't cross the creek, or why he remained on the west side of it.

Until 1854, there was no law under which the unplatted Ocoee lands could be granted, but in 1854, an act was passed providing for the entry and granting of lands in Ocoee District, whether the same appeared on the map of the district or not. Acts of Tennessee, 1854, Chap. 22.

And as heretofore shown in this brief, the two McCroskys and Morton and Griffiths entered and obtained grants for the lands between Slick Rock Creek and the crest of the Hangover ridge, in 1882 and 1892.

It also appears, as far back as 1842, the State

of Tennessee issued grants covering the land in dispute, east of the State Ridge and Jenks Ridge and west of the ridge known as the divide, the land now in dispute.

> "In 1837, North Carolina made provision for the sale of the lands acquired by her through the Cherokee cession, but no surveys or grants within the disputed lines were made by the state before 1853. The entries of land appear to have been made under North Carolina entries in 1853, another in 1859, and in 1860 Grant No. 2784 for 14,800 acres was issued to Gilbert and Feet, under an entry made in 1853, and surveyed in 1856, under which grant the appellants claims."

In further support of the claim that the creek has been recognized as the State line, defendant sought to prove by various witnesses the declarations made by third persons, as hereinbefore recited.

Judge Lurton, continuing his opinion, said:

> "There was little in all this at any moment. The line at the point ran through an uninhabited wilderness, almost inaccessible." (And we add along the State ridge and Jenks ridge.) "The fact of a visible line of marked trees on Slick Rock Creek, observed by a few adventurous hunters, would naturally start the tradition that the state line was on the creek." (And we add on the ridge.) "The same effect doubtless influenced the surveyor general, and his omisison to plat the lands east of the creek

would confirm the reputation of that line. Not more than half a dozen persons are shown to have ever lived within the disputed lines, and there is a conflict as to whether they regarded themselves as living in Tennessee or North Carolina until after 1882, when they, or the greater number, being mere squatters, began to hold under one or the other of the contending titles, and to locate the line to suit their landlords. None of them go back beyond the North grant under which appellants claim, which bears date in 1860. Since 1882, when appellees obtained their grant from Tennessee, most of these inhabitants, if not all, have attorned to appellees and have since voted in Tennessee, and hold themselves out as citizens of the Seventeenth Civil District of Munroe County, Tennessee. No active exercise of jurisdiction over the disputed territory is shown by either state, aside from the issuance of entries or grants to any who chose to apply. As the greater part of their large grant is indisputably in North Carolina, the appellants have paid taxes on the whole in that state. The fact is that the *locus in quo* is so accessible, so worhless for agricultural purposes, and so uninhabited, as to make the active exertion of jurisdiction by either state of no consequence. The land is now supposed to be valuable for timber and mining purposes, hence the present suit."

Judge Lurton in delivering his opinion, quoted the language used by this Court in the case of

Virginia vs. Tennessee, 138 U. S., 503, 37 L. Ed. 537, where the question was a disputed boundary between the States of Virginia and Tennessee, the Court said:

> "Independently of any effect due to the compact as such, a boundary line between the states and provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary."

And in commenting upon this decision, said:

> "But the court was there considering the effect of acquiescence upon a line run and marked by the commission of each state, which has been long recognized by both states as the true line, though, in fact, as afterwards discovered, it departed from the line called for in the grant which ought to have been pursued. This is not the case. Upon the facts stated, the Hangover line was run, marked, and adopted, by the commissioners as the line called for and described in the cession act. From 1821 down to 1836 there is nothing in this record tending to show that either state, nor any persons, were claiming or recognizing the experimental line on Slick Rock Creek as the line. The tentative line on the creek seems

> to have been first treated as the state line as late as in the fall of 1836, when the Tennessee surveyor general stopped a survey of the Cherokee lands ceded to Tennessee in that year, and which included the disputed strip of Slick Rock Creek. Evidence as to the reputation of the creek line of trees as marking the state line, and of other facts indicating a recognition of that line as the actual line, must be unavailing, unless it is persuasive enough to satisfy the legal mind that the state commissioners ran, marked, and adopted the Slick Rock Creek as the true line, although it is a radical departure from the description of the cession act, and contradicted by the description they themselves reported of the line they had run and adopted; or such evidence must show such a long and continuous recognition by both states of the creek line as to operate as an estoppel to deny that it was the line run and marked and adopted in 1821."

He then held that the facts in this case were not sufficient to create an estoppel, and in this we believe that he is sustained by the authorities, and especially by the decisions of this court.

In Bartlett Land & Lumber Co. vs. Sanders, 103 U. S., 316, 288 L. Ed., 549, this Court said:

> "But the remandant raised another point at the trial, namely: That the owners of the Elkins grant had estopped themselves from claiming under it any land eastwardly of the line running north from the northwest corner of the town of Burton or Albany. The evidence offered on this point

tended to show that about, or soon after the date of the Elkins grant, the grantees or some of them employed surveyors to ascertain the extent and boundaries of the grant, and that a line was run directly, (or nearly) north from the northwest corner of Burton to the north line of the grant, as the supposed eastern boundary adjoining Hart's location; but this was done without any communication or agreement with the proprietors of Hart's location, or any other parties having an interest in the adjoining lands, and in ignorance of the true western boundary of that location on the land. The evidence consisted of the testimony as to the declarations of some or one of the grantees, as to the running of such line, made over forty years before, and of a recent examination of marked trees, which indicated a date corresponding with the period referred to.

"We think that the Judge was right in holding that this evidence was totally insufficient, under the law of New Hampshire, or any other law, to show such a settlement of the line, as to estop the owners of the grant from claiming to the extent of the description contained in the deed. Conceding that everything was proved which the evidence tended to prove, it would only show that the grantees made a tentative effort to find the limits of their property in a mountainous and almost inaccessible wilderness, without consultation or communication with any other parties, and

without doing any act or thing that could in the least commit them in the relation to such parties."

And further on, in the opinion, the Court said:

"It is contended, however, that the running of the hypothetical line northerly from the Burton corner was an estoppel as regards to state; that the state, upon the faith of this line being run and marked by the Elkins grantees, entered upon the land eastward of it, and granted the same to Bean and others. That is, the state, by legislative resolve and solemn grant, having in 1830 granted to Elkins and others all the land west of Hart's location, had the right to re-enter upon some 8,000 acres of the same land in 1831 and grant it out to third parties, because the Elkins grantees, in making an exparte survey, had mistaken the position of the west boundary of Hart's location. There is no pretense, certainly no proof, that this survey was made by any concurrence of the parties, or that there was ever any communication between the agents of the state and the Elkins grantees. The agents of the state simply lay by and watched the operations of Elkins and company, and finding, or supposing, that they had made a mistake, and had left a vacant tract of land between the line they ran and Hart's location, stepped in and made another grant to other parties of nearly a sixth part of the tract granted to the Elkins party. Not a particle of evidence was produced to show any acquies-

cence on the part of Elkins and his associates in this proceeding, or that they had any notice or knowledge of it. So far as appears, they have never acknowledged the right of these new grantees, nor have they ever admitted that any one had any right to interfere with the extension of their land eastwardly to Hart's location. We think no case can be found that would make out an estoppel under such circumstances as these."

But the State of North Carolina stands in no position to insist upon an estoppel. It appears in the record that the Honorable Ben Posey, one of the attorneys for the State of North Carolina in this case, was at one time a member of the General Assembly of the State of North Carolina, and that while he was a member of the General Assembly he introduced or had introduced a resolution in the General Assembly to have the line between the States of North Carolina and Tennessee, from the Tennessee River southwestwardly to the Unicoi Mountain, the identical line now in dispute, ascertained and located. That the Governor then selected Mr. Posey to superintend and look after and have this line surveyed. After that, Mr. Posey employed Mr. John Ross McClellan, a practical surveyor of Murphy, North Carolina, to run the line, locate it and put up permanent land marks evidencing such location. That in 1903 or some time thereabouts, the said McClellan, by authority of the State of North Carolina, ran and marked the line from the Tennessee River to the Unicoi Mountain in fact from Cattalouchee Turnpike road to the

Georgia line, and that at the end of each mile put up a stone, stake or marker. This line crossed the Tennessee River at a point some two and a half or three miles west of the mouth of Slick Rock Creek. It then ascended the Fodderstack ridge or lead, passing Wildcat Knob, and on Big Fodderstack, and came around to the ridge known as the divide, and going on south with that ridge until it reached the junction of the Rough Ridge with the divide, thence down that ridge and on south to Unicoi Mountain.

This line is altogether west of the line now contended for by North Carolina, as shown by the Map, Exhibit AA to the deposition of John L. Williams. Mr. Williams and Mr. Hale traced this line and platted it upon this map, and testify as to its accuracy.

This line was run about 1903-4, or between that and 1907, and up until the time this litigation arose, the State of North Carolina claimed this McClellan line to be the true line between the States of Tennessee and herself.

Now, estoppel must be mutual. North Carolina cannot claim that Tennessee is bound by a marked line on the theory of estoppel, when the State of North Carolina never acquiesced in and adopted such line as the line between herself and the State of Tennessee, but claimed this McClellan line to be the true line which was located miles west of the line that she now insists binds the State of Tennessee.

THE CONTENTION OF THE STATE OF NORTH CAROLINA TO THE EFFECT THAT A LINE RUN AND MARKED AT THE TIME OF THE ORIGINAL SURVEY, OR MADE AT THE TIME OF THE EXECUTION OF THE INSTRUMENTS DESCRIBING THE LINE, IF FOUND, CONSTITUES THE TRUE BOUNDARY, HAS NO APPLICATION TO THE FACTS OF THIS CASE.

This principle can only be applied to lines run and marked at the time of the execution of the instrument describing the lines. As applied to this case, the line must have been run and marked before or at the time of the passage of the cession act, and not run and marked twenty-five years after the passage of the cession act.

One of the contentions upon which this principle is predicated, as set forth in the authorities hereinbefore recited, is that the line must be run at or before the execution of the instrument describing the line.

The commissioners in this case were empowered to run and mark the line between the states in accordance with the cession act. Their power was limited, and not general. They were not authorized to run another and different line, but to ascertain the true line as described in that act, and to mark it, and no other line. They had no authority to settle a disputed line. The line was not then in dispute.

Where the line between two tracts of land is unsettled and in dispute, and the parties run the line with a view of settling the dispute and

agree on the marked line as the line described in the title papers, then it is binding on the parties. But where, as in this case, these commissioners were not authorized to settle a dispute, or to agree upon a compromise line, but their authority was limited solely to running and marking the line described in the cession act, then, and in that event, if they actually ran and marked the line insisted upon by North Carolina, it would not be binding upon the State of Tennessee, nor estop the State of Tennessee from now claiming the true line described in the cession act.

This principle is well stated in Schraeder Mining & Manufacturing Co. vs. Packer, 129 U. S. 512, 32 L. Ed., 764, where it is said:

> "The decisions in the other states generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line, wherever it may be found, and that in such case neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered."

And again:

> "If the parties, from misapprehension, adjust their fences and exercise acts of ownership in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement or be binding as

> an assent of the parties; and I agree it is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can recall for respecting them, else they will not be bound. The reason is, that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event." Citing Turner vs. Turner, 2 Ch. Rep., 154; Bingham vs. Bingham, 1 Ves. Sr., 126; Gee vs. Spencer, 1 Vern., 32; Pusey vs. Desbouvrie, 3 P. Wms., 316.

There should be no difficulty in the court reaching a conclusion in this case favorable to the contention of Tennessee. The section of the line from the fore and aft tree on the north bank of Tennessee River to the Unicoi Mountain was run and marked by the commissioners, along and over the crest of the Hangover lead. The description of the line in the report of the commissioners from the fore and aft tree is, thence to the main ridge and along its extreme heights to the Unicoi Mountains. The evidence in this case locates and identifies the main ridge from the Tennessee River to the Unicoi Mountains, as contended for by the State of Tennessee. This, in itself is a great natural land mark. On the other hand, the line contended for by North Carolina is evidenced only by a marked line up Slick Rock Creek, beginning at the Tennessee River, and thence up the spur of the Fodderstack and around to the junction.

We insist that no marks of any kind, identified as state line marks, was found along the State ridge or Jenks ridge.

It will, therefore, be seen that the line insisted upon by the State of Tennessee by reason of the monuments it calls for, is the most certain, the most permanent, and the most readily ascertained, from reading the description of this line in the commissioners report.

In the case of Higuera's Heirs vs. United States, reported in 72 U. S., 827, 18 L. Ed. 471, this court in delivering its opinion, said:

> "Appellants do not deny that the place of beginning is correct, nor do they controvert the fact that the first course is from the back side of the principal's house to a lone tree on the top of the Sierra, which is known as the land mark. The course, as stated by witnesses, and given in the decree, is northwardly, but the termini of the line being given and the respective monuments marking the line admitted, it is clear the monuments must govern. Measurements of distances and the direction of lines in reference to points of the compass mentioned in deed may be made a part of the description of the premises intended to be granted, and in some cases where the lines are so short as evidently to be susceptible of entire accuracy in their measurements, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence, as a means of ascertaining what is intended to be conveyed but

ordinarily surveys are so loosely made and so liable to be inaccurate, especially when made in a rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain and always give place in question of doubt or discrepancy to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artificial objects, such as rivers, streams, stakes, marked trees, fences, or buildings."

And in Ayers vs. Watson, 113 U. S. 594, 28 L. Ed. 1097, it is said:

> "It has been repeatedly held by the Supreme Court of Texas as a general rule, that natural objects called for in grants such as mountains, lakes, rivers, creeks, rocks, and the like control artificial objects, such as marked lines, trees, stakes, etc."

We, therefore, insist that the State of Tennessee under the facts of this case, and under the law applying to the facts, has sustained her defenses and that the complainants bill should be dismissed.

Respectfully submitted,

W. D. SPEARS,
L. N. SPEARS,
Solicitors for Theodore A. Cobb, et al.

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JAMES D. MAHER

No. 4, Original. **October Term, 1914.**

IN THE

Supreme Court of the United States.

IN EQUITY.

THE STATE OF NORTH CAROLINA,
Complainant,

v.

THE STATE OF TENNESSEE,
Defendant.

Brief of the Babcock Lumber and Land Company as Amicus Curiae.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
Counsel for the Babcock Lumber and Land Company as Amicus Curiae.

International, 238 Chestnut St.

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THE STATE OF TENNESSEE,
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BRIEF OF THE BABCOCK LUMBER AND LAND COMPANY AS AMICUS CURIAE.

STATEMENT.

Immediately after the original bill in this case had been filed by the State of North Carolina, and after the State of Tennessee had entered her appearance, the Babcock Lumber and Land Company, a corporation organized and existing under the laws of Maine, and vested with the title to large boundaries of land in Monroe County, State of Tennessee, on May 3, 1909, filed a motion for leave to intervene and to be made a party defendant in the above-entitled cause, and submitted therewith a petition, setting forth the facts upon which said motion was based. (Rec., pp. 11-19.)

This motion for leave to intervene was denied by this court on May 17, 1909, but leave was granted to

counsel for the Babcock Lumber and Land Company to file a printed brief herein as amicus curiae. (Rec., p. 20.)

The original bill filed by North Carolina stated only one dispute and claim against the State of Tennessee, said contention being now known as the dispute at Slick Rock Creek Basin, and set forth in said original bill as beginning at a point about a mile northeast of Tennessee River and extending to the "Junction" of Big Fodder Stack and Hangover Ridges, a point about nine miles south of the Tennessee River. (Rec., p. 7.)

When the Babcock Lumber and Land Company presented its petition for leave to intervene to this court, setting forth its claim to the land lying between the disputed lines, and showing that apparently this suit was of the nature of a private controversy, instituted under the cloak of a sovereign State, and that said controversy had been settled in favor of the Tennessee grantees, under whom the Babcock Lumber and Land Company claimed, by the United States Circuit Court of Appeals of the Sixth Circuit, the State of North Carolina, by its counsel, immediately moved for and were granted leave to file an amended bill, and in said amended bill, after repeating the averments of the original bill, set forth that in addition thereto a considerable part of the line southward from the portion of the line declared to be in dispute by the original bill, has been confused, uncertain and the subject of contention. (Rec., p. 24.)

Under the proof and evidence, the northern part of the boundary line between the respective States is undisputed down to a marked fore and aft State Line hemlock or "spruce pine" tree standing on or near the north bank of the Tennessee River. One disputed location of the boundary line is from this marked fore and

aft tree to a point southward and about nine miles distant, known as the "Junction"; where the ridge known as the Big Fodder Stack Ridge joins the main Hangover Ridge, and is now known as the dispute at the Slick Rock Basin.

The State of North Carolina contends that the boundary line, from the undisputed fore and aft hemlock State Line tree on the north bank of the Tennessee River, turns sharply from its general course and follows down the north bank of the Tennessee River to a point about one-half mile below the said fore and aft hemlock tree, thence crosses the Tennessee River to the mouth of a stream known as Slick Rock Creek, thence follows the meanders of said stream about five and one-half miles, thence leaves said stream following up a ridge leading from the Slick Rock Creek to the Big Fodder Stack Peak, thence southeastwardly along the Big Fodder Stack Ridge to the main Hangover Ridge, thence up the side of said Hangover Ridge to the extreme top of the ridge and thence follows with the extreme height thereof southwestwardly.

The State of Tennessee contends that the boundary line from the undisputed fore and aft State Line tree on the north bank of the Tennessee River, crosses the Tennessee River direct to a lead or ridge which it follows direct to Hangover Peak, one of the highest points of the main Hangover Ridge, and thence with the extreme heights of said ridge to the undisputed point on the south, known as the "Junction," to wit, where it intersects the line as claimed by the State of North Carolina.

The above dispute is the only contention referred to in the original bill and involves the same contentions as to the location of the boundary line as the cases of *Belding v. Hebard*, 103 Fed. Rep. 532, and *Hopkins, et al., v. Hebard, et al.*, 194 Fed. Rep. 301.

Under the proof in this case, the only other dispute, which was the additional contention alleged by the amended bill filed and now known as the Tellico dispute, arises at a point some miles southward from the contention at Slick Rock Basin, the State of North Carolina claiming that the line leaves the main dividing ridge north of the headwaters of the Tellico River and follows down a ridge known as State Ridge, which gradually lowers in elevation as it approaches the river, to the bank of said river, and thence the line crosses the Tellico River and thence follows a ridge leading back to the said main dividing ridge, and thence follows the extreme heights of said main dividing ridge southward.

The State of Tennessee claims that the boundary line continues upon the extreme heights of the main dividing mountain or ridge, that said line does not cross the Tellico River and thereby all the waters of said Tellico River lie within the State of Tennessee. This dispute, known as the Tellico dispute, is substantially the same as that involved in the case of Stevenson v. Fain, 116 Fed. Rep. 147. From the decree of the United States Circuit Court of Appeals in said case an appeal was undertaken to this court and this court held (Stevenson v. Fain, 195 U. S. 166) that the decree of the United States Circuit Court of Appeals was final and therefore there was no right of an appeal to this court.

Grants for the land lying between the disputed lines at the Slick Rock Basin, and between the disputed lines at the head of Tellico River, have been issued by both the States of North Carolina and Tennessee. The grants issued by North Carolina for land located within the disputed area at Slick Rock Basin are older than the grants issued by Tennessee for the same land, but just the reverse is true as to the grants issued by the respective States in the territory of the Tellico dispute,

i. e., the grants issued by the State of Tennessee are generally older than those issued by the State of North Carolina. (Rec., pp. 90-154, 1232, 1233, 1055-1074.)

Growing out of these conflicting grants issued by both the respective States arose the litigation previously referred to as the cases *Belding v. Hebard* and *Stevenson v. Fain.*

Referring to the dispute at Slick Rock Basin, to which this brief is primarily limited: In 1895 one Hebard, a claimant under a grant of the State of Tennessee, which called for the said location of the State Line, at the Slick Rock Basin, as the State of Tennessee claims in the case now before the court, brought a suit in equity in the Chancery Court of Monroe County, Tennessee, to quiet his said title, against D. W. Belding, et al., who claimed the same lands under grants from the State of North Carolina. The cause was later removed to the United States Circuit Court at Knoxville, Tennessee. Belding, et al., claimed in their pleadings that the State Line from the marked fore and aft State Line hemlock tree on the north bank of the Tennessee River followed down the river for one-half a mile, thence crossed the river close to the mouth of Slick Rock Creek and thence (instead of following up the meanders of Slick Rock Creek) ran up a ridge to the west to a place called Stiff Knee, thence to Little Fodder Stack Peak, thence along a ridge to Big Fodder Stack, thence along Big Fodder Stack Ridge to its "junction" with the Hangover Ridge, thus claiming all the land within Slick Rock Basin. Under the proof and evidence, however, Belding, et al., contended only for the line running up Slick Rock Creek for five miles, as the State of North Carolina now claims before this court. The determination of the case depended upon the true location of the State Line.

All of the legislative acts of the State of North Carolina, of the United States and of the State of Ten-

nessee, referring to or describing the boundary line between the respective States, were placed in evidence in the above case and since the said enactments are material to a complete statement of the case, we herewith refer to the same.

The Cession Act of North Carolina of 1789, whereby the territory now comprising the State of Tennessee was ceded to the United States, described the boundary line, now partly in dispute, as follows:

1. Beginning on the *extreme height* of the Stone Mountain at the place where the Virginia line inter-intersects it, running

2. Thence along the *extreme height* of the said mountain to the place where the Wautauga River breaks through it;

3. Thence a direct course to the *top* of the Yellow Mountain, where Bright's Road crosses the same;

4. Thence *along the ridge* of said mountain between the waters of Doe River and the waters of Rock Creek, to the place where the road crosses the Iron Mountain; from

5. Thence along the *extreme height* of said mountain to where the Nolichucky River runs through the same,

6. Thence to the *top* of Bald Mountain;

7. Thence along the *extreme height* of the said mountain to the Painted Rock, on French Broad River;

8. Thence along the *highest ridge* of the said mountain to the place where it is called the Great Iron or Smoky Mountain;

9. Thence *along the extreme height of the said mountain to the place where it is called the Unicoy or Unaka Mountain,* between the Indian towns of Cowee and Old Chota;

10. Thence along the main ridge of the said mountain to the southern boundary of this State. (Rec., pp. 3, 33.) The call set forth in the paragraph above marked 9 includes the portion of the line involved in the dispute of the Slick Rock Basin.

The Acts of Congress accepting said cession and creating the State of Tennessee, and the description of the line in the Constitution of the State of Tennessee, all use the same words as the Cession Act in describing the said boundary line. (United States Stat. at Large, Vol. 1, pp. 106-109, 491, 492.)

Not material to the issue of this case, but of value in a narrative sense, is the fact that in 1799 the boundary line was run, marked and reported from Virginia to a point south of the Pigeon River near the Cataloochee Turnpike Road, but south of said turnpike road the line was not run, marked and reported, as will appear, until 1821. (Rec., p. 3.)

During 1819 and 1820, the States of North Carolina and Tennessee each enacted a statute authorizing their respective Governors to appoint joint commissioners to settle, run and mark the boundary line between the respective States, "agreeably to the true intent and meaning" of the Cession Act. (Rec., pp. 81, 82.)

The joint commissioners did run and mark the line from the point near where the commissioners of 1799 ended their work, and each State passed an Act during 1821 ratifying, confirming and adopting the line as reported by the commissioners. (Rec., pp. 83-88.)

The Tennessee Confirmatory Act makes the calls for the line as follows:

Begins at a stone set up on the north side of Cataloochee Turnpike Road:

1. Thence on a southwestwardly course to the Bald Rock on the *summit* of the Great Iron or Smoky Mountain, and

2. Continuing southwestwardly on the *extreme height* thereof to where it strikes Tennessee River,

3. Crossing Tennessee River at the distance of sixty-five miles from the beginning

4. From Tennessee River to the main ridge and with the *extreme height* of the same to the place where it is called the Unicoy or Unaka Mountain;

5. Thence along the *extreme height* of the Unicoy or Unaka Mountain to the southwest end thereof at the Unicoy or Unaka Turnpike Road.

(Here the line leaves the mountain and the only compass call made by the commissioners is then made, being)

6. Due south to the southern boundary line of the States of North Carolina and Tennessee. (Rec., pp. 86, 87-88.)

The full text of the Tennessee and North Carolina Confirmatory Acts describes the boundary in identical words, but the Confirmatory Act of North Carolina concludes with these words: "The whole distinctly marked with two chops and blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile. (Rec., p. 87.) These words are not contained in the Tennessee Act.

After the case of Belding v. Hebard was placed at issue it was referred to a special master. Much of the testimony, including the fact that the marked trees on Slick Rock Creek were more numerous than on the Hangover Ridge line, and also various surveys made within the territory of the disputed lines, placed in evidence in this case now before the court, were submitted in the case of Belding v. Hebard.

The master, the Circuit Court and the Circuit Court of Appeals found the true location of the line as settled, run and marked by the joint commissioners

of 1821, to be as contended for by Hebard, the Tennessee claimant, and by the State of Tennessee in this case, to wit, from the marked fore and aft State Line hemlock tree on the north bank of the Tennessee said line crossed the Tennessee River direct to a lead or ridge leading direct to Hangover Peak, thence with the main Hangover Ridge to the undisputed point on the south, known as "Junction," where the crest of said ridge towers several hundred feet above where the Big Fodder Stack Ridge joins said main Hangover Ridge. Certain quotations of the fundamental reasons stated for the findings of the master and of the courts in that case will be pertinent in presenting the vital points of that case and of the case now before the court.

The special master, Asbury Wright, in his report, after referring to the various Acts describing the line and the evidence, says:

> "It must be kept in mind that these commissioners were not making a new line, but were simply determining the true location of the line fixed by the Cession Act of 1789. They got on the top of the Great Iron or Smoky Mountain, and were then to determine the true location of the line between that point and the Unaka Mountain, and to do so, they were to run along the extreme height of the mountain. They report that they run on the extreme height of the mountain to where it strikes the Tennessee River, and the river being a natural object, permanent and notable, they stopped in their description to call attention, particularly and minutely to the several prominent and notable objects passed. The first reference to the Tennessee River is 'to where it strikes the Tennessee River,' and the next is 'crossing the Tennessee River,' and then the report says, 'from the Tennessee River,' and yet if the line was run up Slick Rock Creek, as contended for by defendants, then either before crossing the river or afterwards, the line would have to run down the river one-half mile, and this not in the general course

the line was running (southwestwardly), but back at an acute angle to the line run and in a northwest course, and in running down the river and up Slick Rock Creek they would not have been running as the line called to run in the Cession Act, along the extreme height of the mountain to where it is called Unaka, but for one-half a mile would have been running down a large river in the deep gorge cut through the mountain, and for more than five miles up Slick Rock Creek in a basin or valley six miles long and three miles wide, surrounded by mountains from one to three thousand feet high. It would certainly not have been in compliance with the Cession Act. It is true that it is my purpose to determine where they actually run and located the line and not whether they complied with the Cession Act, but I cannot believe that they would abandon the line called for in the Cession Act, and be diverted from their course in this way and make no mention of it in their report. They had just paused in their report to make particular mention of many objects, less prominent and less noteworthy, than either the Tennessee River or Slick Rock Creek." (Rec., p. 341.)

From the decision of the United States Circuit Court at Knoxville, Tennessee, rendered by Judge Clark, we quote as follows:

"It must not be forgotten, however, that the commissioners in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a

distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading, for the commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction; that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run the line as claimed by the defendants." (Rec., p. 369.)

The opinion of the United States Circuit Court of Appeals at Cincinnati delivered by Judge Lurton states inter alia:

"The first call in the boundary act of both States is 'from the Tennessee River to the main ridge.' There are no words of intermediate description. The line should therefore be a straight one from the last monument on the river, the fore and aft pine tree, to the 'main ridge.' There being no possible doubt as to the identity of the 'main ridge' referred to, there can be no doubt on the face of the description following, that the line should then run 'along the extreme height of the same' to the next natural monument, to wit, 'to the place where it is called the Unicoy or Unaka Mountain.' Finding, as we do, upon the line thus located by identified natural objects, two old State Line marked trees, marked, as shown by blocking and examining the annular growth, in 1821, we have no difficulty in agreeing that the line, as run and marked by the commissioners in 1821, was the Hangover line, as founded by the special master and as claimed by the appellees. The probabilities are that the surveyors tentatively or experimentally marked the line up Slick Rock Creek. Discovering that thereby they made

> a radical departure from the 'extreme height' of the mountain chain called for by the Cession Act of 1789, they abandoned the creek and ran, adopted and reported the line as running along the extreme height of the 'main ridge,' now known as Hangover Ridge. This is the only reasonable explanation consistent with the absence of descriptive words calling for a line running down the Tennessee River and then up Slick Rock Creek." (Rec., pp. 410, 411.)

Prior to the final decree of the United States Circuit Court of Appeals in the case of Belding v. Hebard, entered July 13, 1900, neither the original report of the commissioners of 1821 nor the map filed therewith had been found. However, about January, 1904, the archivist of Tennessee found the original report made by the commissioners of both States in 1821 and what appears to be the original map or plat referred to in said report. (Rec., p. 1088.)

During 1907, W. R. Hopkins, et al., claiming to have purchased the Belding title, filed a bill of review, based upon the newly discovered map of 1821, in the United States Circuit Court at Knoxville, Tennessee, claiming that said map shows the boundary line reported by the commissioners so located as practically to include all of the Slick Rock Basin with North Carolina. Upon the proof, however, Hopkins, et al., like his claimed ancestors in title, abandoned the claim that the line was located so as to place all of Slick Rock Basin in North Carolina, and limited their contention to the claim that the line from the mouth of Slick Rock Creek followed up the meanders of Slick Rock Creek about five and a half miles, etc., identical with the contention (under the proof) of Belding, et al., claimant under North Carolina in that original case.

The original report of the commissioners of 1821 described the boundary line in the identical words that are used in the Confirmatory Acts of the States, which

were in evidence in the original case of Belding v. Hebard and also includes the words which are in the Confirmatory Act of North Carolina, but not in the Confirmatory Act of Tennessee, to wit:

> "The whole distinctly marked with two chops and a blaze on each fore and aft tree, and three chops on each side line tree, and mile marked at the end of each mile." (Rec., p. 87.)

The map of the commissioners of 1821 represents typographically and pictorially *all of the calls and descriptions* of the boundary line, in accordance with and as set forth in the Confirmatory Acts of North Carolina and Tennesee, and the *original* report of the commissioners of both States. (Rec., p. 776.)

The map by hachures or etchings shows the boundary line north of the river located on the crest of mountains, that it crosses the Tennessee River, and that immediately upon crossing the Tennessee River by the same character of hachures or etchings, the line is shown located upon mountains and so continues to a point south of any portion of the boundary line herein disputed. Where the Confirmatory Acts and report of the commissioners specifically call for the line being located upon or crossing mountains, streams or trails, the map concretely represents each and all of them.

The said map of 1821 shows where the said boundary line reaches the south bank of the Tennessee River and it shows near or next to said line, but to the east thereof, the mouth of a stream marked "creek" and for a short distance the course of said stream and the boundary line is nearly the same, but said boundary line, according to the map, both departs from and approaches the stream or creek, and within one and one-half miles from its mouth the said creek departs radically eastward from the boundary line further and further into the State of North Carolina to its source.

The report of the commissioners and the Confirm-

atory Acts of both States make *no* reference whatever to this "creek."

The State of North Carolina and private claimants under its grants contend that said "creek" or stream is Slick Rock Creek, and that said stream is merely sketched in wrongly, and that it should have been sketched along the boundary line for over a distance of five miles from its mouth, and further claim that the general "courses" of the platted lines on the map for said distance conform to the general course or trend of Slick Rock Creek.

The State of Tennessee, and private parties claiming under its grants, contend that the "creek" shown east of where the boundary line strikes the south bank of the Tennessee River, is Cheoah River or Creek, and also claim that the boundary line as shown on said map of 1821 conforms to their contention of the true location of the line in that the line approaches the Tennessee River located on mountains, crosses the river by the shortest route, or direct, and that on leaving said river the line is, by the same character of markings as used north of the river, shown on mountains and so continues south of any disputed point.

After the proof in the bill of review proceedings was closed, the original bill of the State of North Carolina was filed (March, 1909) against the State of Tennessee, setting forth the said dispute, and no other, and praying for the determination of the true location of the said line, and thus it is apparent that the litigation now before this court, as between two sovereign States, is the outgrowth of the litigation between private parties begun nearly twenty years ago in the case of Belding v. Hebard. In fact, there is sufficient evidence for asserting that this case now before the court is but a private controversy, under the cloak of a great sovereign State.

It appears in the evidence that the State of North

Carolina instituted this action only after an agreement or bond had been executed by private parties (Hopkins and others) to indemnify the State of North Carolina against costs incident to the case and fees of special counsel, although this case is only to determine the sovereignty and jurisdiction of the State of North Carolina in the disputed territory. (Rec., pp. 1535-1539.)

In the bill of review proceedings, instituted by Hopkins, et al., Judge Clark (who had rendered the opinion in the Circuit Court in the original case of Belding v. Hebard), in allowing the bill of review to be filed, said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill might finally be expected. . . . If I refuse to allow the bill of review to be filed it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed . . . the action of the court would be subject to easy review and petitioners . . . would suffer no error at the hands of this court that could not be readily corrected. In view of these considerations, I have determined to allow the bill to be filed." (Hopkins v. Hebard, et al., 194 Fed. Rep. 306.)

The case, upon bill of review, coming on to be heard, the said bill was denied and the petition and bill dismissed (September, 1909) by the said Circuit Court at Knoxville, in an opinion by Judge John E. McCall, in which, inter alia, the court said:

> "There is nothing in the newly discovered evidence to warrant this court in holding that had it been before the court at the original hearing, a different conclusion would have been reached; but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

"It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word 'creek,' is sufficient to warrant the court to reverse the holding in the original case, and write upon the face of the map, and into the commissioners' report, according to the showing on the Burns map, the words: 'Thence along the north bank of the Tennessee River to the mouth of Slick Rock Creek. Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover.' Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review." (Hopkins, et al., v. Hebard, et al., 194 Fed. Rep. 305.)

Also, on page 306:

"From the location of this stream marked 'creek' on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River and not Slick Rock Creek."

Upon appeal by Hopkins, et al., to the Circuit Court of Appeals, the decree of the Circuit Court below was affirmed upon grounds not material to this case between the States.

After the case upon bill of review was submitted to the Circuit Court of Appeals at Cincinnati, Hopkins, et al., filed a motion to remit the record to the court below to permit a certain copy of field notes, alleged to be the field notes of one William Davenport, surveyor for the State of North Carolina on the boundary line survey in the year 1821, to be placed in the record of the case. The court ordered that the motion stand over with leave for affidavits to be filed on each side

as to the authenticity of said field notes. Testimony was submitted, as well as affidavits under said order, and the Circuit Court of Appeals denied the motion. No legislative enactments of either State and neither the report nor the map of the commissioners refer to any field notes whatever. The alleged copy of said field notes is in the record of this case, together with testimony thereon.

The State of Tennessee's Contention is Sustained by the Primary Documentary and Undisputed Evidence.

The undisputed fore and aft State Line hemlock tree on the north bank of the Tennessee River, one-half mile above the mouth of Slick Rock Creek, is so marked as a fore and aft tree as to carry the line to and across the Tennessee River at that point. (Rec., p. 1393.)

Even Burns, chief witness for the State of North Carolina, and previously for claimants under North Carolina, admits the above fact. (Rec., pp. 272, 273.)

The contention of Tennessee is that the line crosses the river at this point to a bluff and follows a lead or ridge direct to the Hangover Peak, and thence over the extreme heights of the ridge, of which Hangover Peak is one of the highest points, to the undisputed point on the south, called the "Junction" where the line claimed by North Carolina intersects the same.

It is well to note at this time the various documentary and legislative enactments describing the location of the line, and particularly as to the locative calls of the parts of the line in dispute at the Slick Rock Basin.

The Cession Act of 1789, beginning at the Virginia line and locating the line on the "extreme heights" or "top" or "summit" of various mountains, declares the boundary line, including the part now in dispute, as on

the "extreme height" of the Great Iron or Smoky Mountain. (Rec., pp. 3, 33.)

As stated previously, the description of the line in this Cession Act is identical with the description referred to in the Act of Congress accepting said cession and the Act of Congress creating the State of Tennessee. North Carolina by Act of Legislature, 1796, provided for the survey of her western boundary and directed that it should be surveyed and established "agreeably to the true intent and meaning" of said Cession Act. (Rec., p. 34.)

Under this Act commissioners in 1799 ran the line from Virginia southward of the Pigeon River and Cataloochee Turnpike. No portion of that survey reaches the part of the boundary now in dispute. It will be noted that these commissioners of 1799 filed field notes as a part of their report. (Rec., p. 3.)

During 1819 and 1820, the Legislatures of North Carolina and Tennessee authorized the appointment of joint commissioners to run, mark and settle the said boundary line "agreeably" to the true intent and meaning of said Cession Act. (Rec., pp. 34-35.)

The commissioners performed their work by beginning at or near the point where the commissioners of 1799 stopped their survey, and report they ran the line as "designated" in the said Cession Act, and that they ran the line southwestwardly on the extreme height of the Great Iron or Smoky Mountain to the Tennessee River, *and from the Tennessee River to the main ridge* and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain. The Confirmatory Acts of the respective States, ratifying the commissioners' report, use the identical language used in said report as to the locative calls.

A stipulation was filed in the case of Belding v. Hebard that the Unicoy or Unaka Mountain began at a point, fifteen miles south of the undisputed point called

the "Junction" where the Big Fodder Stack Ridge joins the Hangover Ridge. (Rec., p. 1393; Rec. Hopkins v. Hebard, p. 327.)

It should be observed that the ridge on which is located the "Junction," Stratton Bald Peak, Hao Peak and Hangover Peak is reached by the line claimed by North Carolina at the "Junction" and also reached by the line claimed by the State of Tennessee at Hangover Peak. North Carolina does not dispute the line after it reaches *this* ridge about eleven miles from the undisputed marked fore and aft hemlock tree on the north bank of the Tennessee River. The line claimed by Tennessee reaches this same ridge at Hangover Peak about four and one-half to five miles from said marked fore and aft tree. Can there be stronger proof that this is the main ridge referred to in the call "from the Tennessee River to the main ridge and along the extreme height of the same to where it is called the Unicoy or Unaka Mountain" where both contending States finally concluded on the same ridge? This is even more marked when it is observed from the map of this territory (Rec., p. 50), that to reach this main ridge at the "Junction" the State of North Carolina's contention necessitates the line to run southeast from Big Fodder Stack Peak to reach the only ridge answering any authoritative description of the boundary line. All the locative calls for the line include a southwestwardly trend until near the southern boundary of Tennessee, south of any point disputed. To get back to the undisputed line, North Carolina is compelled to take a southeast course or trend.

Further, it is to be noted that where the Big Fodder Stack Ridge strikes the main ridge (of which Hangover Peak is a prominent point), the place where it joins said main ridge is several hundred feet below the crest of the main ridge and it is necessary to climb up on the main ridge to follow the extreme heights

thereof southward. (Rec., pp. 579, 580, 1377, 1394.) That the ridge, of which the Hangover Peak or mountain is a prominent part, is the "main ridge" referred to in the commissioners' report and the Confirmatory Acts of the respective States in the call, after crossing the Tennessee River, "from the Tennessee River to the main ridge and along the extreme height of the same to where it is called the Unicoy or Unaka Mountain" was held by the master, the Circuit Court and the Circuit Court of Appeals in the case of Belding v. Hebard (103 Fed. 532; Rec., p. 1394) and is established by the testimony in the record of this case, including that of witnesses offered by North Carolina, and who testify that the nearest and direct route to the main ridge is the ridge beginning at the bluff directly opposite the undisputed fore and aft State Line tree on the north bank of the Tennessee River, and which tree is marked as to indicate the line crosses the river at that point. (Rec., pp. 272, 273, 1393.)

The master, the Circuit Court and the Circuit Court of Appeals in Belding v. Hebard, each held that the call of the Cession Act for the boundary line along the extreme height of the Great Iron or Smoky Mountain to the place where it is called Unicoy or Unaka Mountain, and the identical calls of the report of the commissioners and the Confirmatory Acts of each State, to wit, southwestwardly on the extreme height of the Great Iron or Smoky Mountain to where it strikes the Tennessee River, from the Tennessee River to the main ridge and along the extreme heights of the same to the place where it is called the Unicoy or Unaka Mountain, place the line over the Hangover Mountain from the marked fore and aft hemlock on the north bank of the Tennessee River to the undisputed "Junction" to the south; as claimed by the State of Tennessee in this case.

It is axiomatic that there can be but one main ridge to properly fit such a call; evidently the commissioners considered there was no doubt as to this call and it is apparent that the State of North Carolina does not fail to recognize this ridge as the main ridge, as the line claimed by it reaches the same ridge, merely further south of the point where the line claimed by Tennessee strikes it.

The elevations of the line claimed by the State of Tennessee throughout its course are from 500 to 2500 feet higher than the corresponding points on the line as claimed by the State of North Carolina. (Gannett, Rec., pp. 471, 472.) The highest elevation on the line claimed by North Carolina in the disputed portion of the line is 4300 to 4400 feet. The 4900 feet mentioned by Gannett (Rec., p. 472) is the elevation at the "Junction," an undisputed point. The highest elevation in the line claimed by the State of Tennessee is 5300 feet. (Gannett, Rec., p. 472.) That the line claimed by Tennessee over Hangover Mountain had trees thereon marked with State Line marks of 1821 was found and held by the master, the Circuit Court at Knoxville and the Circuit Court of Appeals at Cincinnati, in the case of Belding v. Hebard, as to at least a black oak and sourwood trees, blocks from which were in evidence in that case. Testimony as to trees along the Hangover line bearing State Line marks was given by Hale (Rec., pp. 1313, 1331, 1332), Wilson (Rec., p. 1347) and Muller (Rec., p. 1370) in said suit in 1896. After Belding offered testimony to discredit the Hale, Wilson and Muller testimony as to said trees bearing proper State Line marks, Hale blocked two of the trees; the black oak and sourwood referred to above, which were found and held to bear proper State Line marks. The only evidence in this case, not in the case of Belding v. Hebard, opposed to the evidence which was sufficient unto the master and the Circuit Court and Circuit

Court of Appeals, as stated, is the opinion of witnesses for North Carolina who do not claim to have ever seen the trees before they were blocked nor the blocks.

The map of 1821 referred to in the report of the commissioners conforms closely to the calls of the report of the commissioners. From the beginning of the line near the south bank of the Pigeon River the line is shown by hachures or etchings to be located on mountains until the Tennessee River is reached, which corresponds to the first call in the report "southwestwardly course to the Bald Rock on the summit of the Great Iron or Smoky Mountain and continuing southwestwardly on the extreme height thereof to where it strikes the Tennessee River." The next call of the report is: "Crossing the Tennessee River," to which the map conforms. The next call of the report is: "From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain." The map by the same character of markings used north of the river to indicate that the line was on mountains, shows the line from the south bank of the river located on mountains. The next call of the report is: "Thence along the extreme height of the Unicoy or Unaka Mountain to the southern end thereof as the Unicoy or Turnpike Road," to which the map conforms. The line then leaves the mountain and the first and only compass call is given "due course south . . . to a spruce pine on the north bank of the Highwassee River below the mouth of Cane Creek"; the map conforms thereto; and then the report calls "thence up the river the same course about one mile crossing the same to a maple . . . on the south bank of the river," and the map conforms to the call. The final call is the same course due south eleven miles and 223 poles to the southern boundary of the two States. The map conforms to the call.

The report also calls for the line striking the Tennessee River about seven miles above the old Indian town of Tellassee, crossing Porter's Gap at the distance of twenty-two miles from the beginning; passing Meigs boundary post at thirty-one and one-half miles, the Equonettly path at fifty-three miles, crossing Tennessee River at sixty-five miles, striking the old trading path leading from the valley towns to the overhill towns, near the head of the west fork of the Tellico River, at the distance of ninety-three miles—striking the Unicoy Turnpike at one hundred and one miles. With the exception of Porter's Gap and Meigs Post all such places are indicated, with approximate exactness, on the map. It will be noted that all such places referred to are called for in full miles, only Meigs boundary post being called for at a half mile point. (Rec., p. 83.)

The map, therefore, conforms generally to the calls of the report and the Confirmatory Acts of the States, and to the Cession Act as to the line being on the extreme heights of the Great Smoky Mountains to the Unicoy or Unaka Mountains, which locates the line as claimed by the State of Tennessee over Hangover Mountain. Further, Tennessee claims the line from the undisputed fore and aft hemlock tree on the north bank of the Tennessee River crosses the river direct, which the map confirms; thence the line is immediately located on mountains and so continues to a point south of any disputed point, which the map confirms.

The map of 1821 shows that the line strikes the south bank near the mouth of a stream marked "creek" and that said stream is east of the line. The report of the commissioners and the Confirmatory Acts made no reference to this "creek." Tennessee claims that this creek represents the Cheoah River, which flows into the Tennessee River about a mile to a mile and a half above where Tennessee claims the line crosses

Tennessee River. The waters on the eastern slope, from the mountains over which Tennessee claims the line, drain into the tributaries of Cheoah River.

North Carolina claims the said "creek" represents the Slick Rock Creek, but erroneously sketched away from the boundary line and that it was intended to form a part of the boundary line for a distance of over five miles from its mouth, which contention we will discuss more fully herein.

Neither the commissioners' report, nor any of the legislative acts, describe the boundary line from the point where it strikes the Tennessee River, as being thence down the north bank of the Tennessee River one-half a mile, thence crossing said river to the mouth of a creek for five miles, etc. Neither does the map of 1821 represent the boundary line as supporting any such contention.

It is very striking that the line claimed by North Carolina involves two abrupt changes from the southwestwardly trend called for throughout the report of the commissioners and the Confirmatory Acts of both States, to wit, the first abrupt departure is from the undisputed State Line fore and aft hemlock tree on the north bank of the Tennessee River, thence following down the north bank of said river for one-half mile, which would be on a course *north* of west instead of *south*westwardly. The first abrupt change was therefore, where they first leave the undisputed line. Now note that the second abrupt change is where the North Carolina line returns to the undisputed line at the Junction, the course of their line being southeast from Big Fodder Stack Peak to the "Junction." Thus it appears, upon leaving an undisputed point on the north they violate the call for a southwestwardly trend, and to return to an undisputed point, they again are compelled to violate the same general call.

The fore and aft "spruce pine" or hemlock tree standing on the north bank of the Tennessee River is a very convincing witness upholding the contention of the State of Tennessee and a very serious obstacle in the contention of North Carolina. Mr. Burns, the principal witness for North Carolina, states (Rec., pp. 271, 273) that when approaching the Tennessee River at a point about a mile north of the river, the commissioners, by the line they marked on the ground, deviated or side-stepped from their course as shown on the map of 1821, to the left or east, and came down to the admitted fore and aft line tree on the north bank of the Tennessee River; that they then made a turn at right angles and went down the north bank of the Tennessee River for a mile or more to a point opposite Slick Rock Creek; that the ground between said point a mile north of the river and the mouth of Slick Rock Creek was difficult to get over; that they simply went down to the "spruce pine" fore and aft tree as a matter of convenience and did not intend to show the said marked tree line on the map of 1821.

Witnesses for both sides testified that the trees were marked as State Line trees from a point a mile north of the Tennessee River all the way down to the "spruce pine" fore and aft tree. This fore and aft tree is not denied nor it is denied that the "spruce pine" tree is a fore and aft State Line tree and marked for the line to cross the river directly opposite thereto. Surely, if the commissioners went down from the said point a mile north of the Tennessee River from the marked tree line to the said "spruce pine" fore and aft tree, because the other course from that point to a point opposite Slick Rock Creek, or to the mouth of Slick Rock Creek was inaccessible, they certainly should have effaced their line marks or at least have made counter marks on trees indicating that they had abandoned the line marked or referred to the same in their report.

Witnesses for North Carolina, in their testimony, did not make a clear statement as to whether the State Line adopted by the commissioners from the point a mile north of the Tennessee River followed the marked line to the "spruce pine" fore and aft tree, thence down the north bank of the river to a point opposite Slick Rock Creek, thence to the mouth of Slick Rock Creek, or whether the commissioners adopted one straight line from the said point a mile north of the river to the mouth of Slick Rock Creek. They left their position in doubt, but admitted that the said fore and aft "spruce pine" tree, a half a mile above Slick Rock Creek on the north side of the river, was intended by the commissioners to be a line tree. North Carolina is thereby forced to the conclusion that the commissioners changed their course at right angles and followed down the river a half a mile. Clearly the commissioners did not do so for the purpose of ascending a ridge, and surely they did not do so for the purpose of ascending a creek, because the report does not mention a creek.

It must be conceded that the purpose of this commission was to locate the line in accordance with the Cession Act of North Carolina of 1789, which calls for a course: "Thence along the extreme height of said mountain," and if we admit that their purpose was to follow main ridges and the extreme heights of main ridges rather than to run one absolute straight line, there can be no excuse for the theory that the commission deliberately changed their course at right angles and ran a half mile without any explanation of it or reason for it whatever. It was not to get to the main ridge, because the Fodder Stack was not the main ridge. It was conceded by all that the Hangover is of the main ridge. (Rec., pp. 269, 461, 481, 514.) And if the Fodder Stack were the main ridge, they would have to go some five miles up the gorge of a creek to get to it, while the call in the report of the commission "From

Tennessee River to the main ridge and along the extreme height of the same," meaning that the line must go direct to the main ridge immediately on reaching the south side of the Tennessee River, and it is conceded that the Hangover is the only main ridge on the south side of the Tennessee River immediately opposite the fore and aft spruce tree. That main ridges and extreme heights of the same were to be the monuments that located the line is apparent on examination of the Cession Act of North Carolina and the report of the commission because the moment they reach a point after descending from the main ridges they run by a course due south. The language of the report is: "From Tennessee River to the main ridge and along the extreme heights of the same to a place where it is called the Unicoy or Unaka, Mountain, striking the old trading path from the valley towns to the overhill towns near the head of the west fork of the Tellico River and at the distance of ninety-three miles from the beginning; thence along to the extreme heights of the Unicoy or Unaka turnpike road where a corner stone is set up marked Ten. on the west side and N. C. on the east side and where a hickory tree is also marked on the south side Ten. 101 M, and on the north side N. C. 101 M, being 101 miles from our beginning; from thence a *due course south* two miles and 252 poles to a spruce pine on the north bank of the Highawassee River below the mouth of Cane Creek; thence up the said river the same course about one mile and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence *continuing the same course due south* eleven miles and 223 poles to the southern boundary line of the State of Tennessee and North Carolina."

In their report, when they ceased to follow the extreme heights of the main ridges, they adopted their first and only call for a course. In other words, indicating that the main ridges were to be followed even if in doing that they were not following a straight course.

It is urged by North Carolina that there are many more trees bearing State Line marks on Slick Rock Creek than on the line over Hangover Mountain. That fact was in evidence and fully considered by the master and the respective courts in the case of Belding v. Hebard, all of whom commented on the fact that they occurred in strange clusters, and the courts and master determined that though they may have been marked by the commissioners, they clearly abandoned that line and adopted the line over Hangover Mountain.

The testimony shows that all the marked trees on Slick Rock Creek are found between the mouth of said creek and where said creek is crossed by an old trail which comes through Slick Rock Gap and crosses said creek within two miles of the river, and no other marked State Line trees are found on Slick Rock Creek for over three miles, where another old trail crosses from Slick Rock Creek to Citico Creek along the same ridge as the one North Carolina claims the boundary line follows from Slick Rock Creek to Big Fodder Stack Peak.

Burns testifies that on Slick Rock Creek from tree No. 45 on his map (Rec., opp. p. 256) *he found no other* State Line trees on said creek for the next three miles, although he admits an abundance of timber throughout said three miles (Rec., p. 276), and that he found no other marked trees until he reached Big Fodder Stack Lead, where he found marked tree No. 46 as shown on said map (Rec., pp. 276, 315, 316), at the point where North Carolina claims the line leaves the creek.

Burns' map (Rec., opp. p. 256) shows tree No. 31 at the mouth of Slick Rock Creek at Station 191-25 and tree No. 45 at Station 293-33 and Burns' survey notes (Rec., pp. 532, 533) show the distance from the mouth of Slick Rock Creek to said tree No. 45 to be 9993 feet or less than three miles. Hyde's survey notes (Rec., p. 785) of the line up Slick Rock Creek

show the creek is crossed by the "Slick Rock Trail" at 596 poles, approximately 9900 feet. Burns testifies that Slick Rock trail crosses Slick Rock Creek about two miles from the river (Rec., p. 315, Qs. 307, 308). (Also see Q. 55, Rec., p. 940, and entry of J. M. Lyle, No. 445, p. 903.)

So it appears that all the marked trees from the mouth of Slick Rock Creek to Burns' tree No. 45 are found between the mouth of the river and an old trail which crosses the creek near Burns' tree No. 45 and within two miles of the Tennessee River. As stated above, Burns states no other trees were found up said creek for three miles from tree No. 45 until tree No. 46 is reached, at Big Fodder Stack Lead, where another old trail crosses Slick Rock Creek and runs over the Big Fodder Stack Lead from Slick Rock Creek to Big Fodder Stack Peak. (Rec., p. 1341.)

The fact that all the marked trees on the Slick Rock route are found from the mouth of Slick Rock Creek to where an old trail crosses said creek, and then no more of the said marked trees are found until at or near another old trail up Big Fodder Stack Lead is reached—with a three-mile gap of no marked trees—would seem to confirm Judge Lurton's suggestion as to how said trees may have been marked, stated in his opinion as follows:

> "As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation. . . ." (Rec., p. 1397.)

It is further to be noted that though so many marked trees are claimed on the Slick Rock route "no mile marked tree" was found or claimed. Also State Line marks of proper age have been found far from any line contended for by either parties to this suit. (Rec., pp. 1161, 1331, 1377, 1397.)

The "Creek" on the Map of 1821 East of Where the Boundary Strikes the South Bank of the Tennessee River Represents Cheoah River.

The waters from the eastern slope of Hangover Ridge flow into the tributaries of the Cheoah River. It is the first stream of importance that flows into the south side of the Tennessee River east of the line claimed by the State of Tennessee over Hangover Mountain.

The Cheoah River is about one and a quarter miles up the river, eastwardly, from the undisputed fore and aft State Line hemlock tree on the north bank of the Tennessee River. If this stream marked "creek" on the map of 1821 *does not* represent Cheoah River or creek, then there is no stream on the map of 1821 representing the Cheoah River. As is shown by the United States topographical map (Rec., p. 1577) the Cheoah River drains a much greater area than any other stream (except the Tennessee River) near either the disputed lines.

From the map of the Slick Rock Basin (Rec., p. 50) it will appear that Slick Rock Creek lies entirely within a basin, with the Hangover Ridge on the south and east thereof and the Fodder Stack Ridges on the west. It also appears that the Slick Rock Basin *heads under* the point called "Junction," *an undisputed point on the State Line.* The "Junction" is formed by the meeting of the higher Hangover Ridge with the lower Big Fodder Stack Ridge, which fact would be known to anyone at the "Junction." The "Creek" on the map of 1821 is not shown as having its source or as heading at any point in the State Line, but to the contrary is shown as having its source several miles eastward of any point on the State Line, which fact corresponds to the location of the Cheoah River.

Nor does said map of 1821 portray the "Creek"

under discussion as lying within a mountainous basin made by ridges which intersect at a point in the State Line, which it should do if the "creek" shown thereon represented Slick Rock Creek.

Also, the "Creek" on the map of 1821 is much longer than Slick Rock Creek, and is represented as draining an area much larger than Slick Rock Creek Basin, and thereby conforms to the Cheoah River, which is much longer than Slick Rock Creek and drains a much larger basin. (Map, Rec., p. 1577.)

Also, the Slick Rock Creek has no notable right angle bend to the east, at a short distance from its mouth, as does the "creek" on the map of 1821, but the Cheoah River has just such a notable abrupt right angle bend to the eastward not far from its mouth. See United States topographical map (Rec., p. 1577).

Mr. Williams testifies that the distance from Hao Peak, which is on the main Hangover Ridge, according to Burns' map, is four and one-half miles from the Cheoah River at that point. (Rec., p. 1418.) The Hao Peak is on the line contended for by the State of Tennessee several miles from the Junction on the south, and over six miles from the Tennessee River, and the "creek" on the map of 1821 is about four and one-half miles from the State Line shown on the map of 1821 from a point on said line six or seven miles from the river.

Mr. Williams also testifies:

> "Q. 134. Well now Mr. Williams if we assume that the surveying party in 1821 did go up the Slick Rock Creek to the Fodder Stack Lead and then up that lead to Fodder Stack and thence on to the Junction and then intended that stream marked 'creek' to represent Slick Rock Creek as it is laid down on that map, what would it indicate as to the character of the work done by those surveyors?

A. Well granted that they did go up Slick Rock Creek for five miles and over the Fodder Stack Ridge and show Slick Rock Creek as they have on the map and without the tributaries shown we know about and without showing anything on that map for Hangover Ridge when they had sketched in so many other ridges along that line adjacent to the State Line, it would indicate to me that they were grossly careless and incompetent." (Rec., p. 1419.)

It will be noted also from said topographical map that the very form or course of the Cheoah River is very similar to the course of said "creek" on the map of 1821, and that on said topographical map there is shown between the Tennessee River and Cheoah River a mountain ridge called "Yellow Creek Mountain" which corresponds to the mountains indicated between the Tennessee River and the said "creek" on the map of 1821. On the map of 1821 eastward of the boundary line the first stream flowing into the Tennessee River on its north bank, as sketched on said map, corresponds in location and course to Twenty Mile Creek on the said United States Topographical map (Rec., p. 1577), and the comparative location of this stream on the north bank of the Tennessee River, as shown on the map of 1821, relative to the course of the "creek" under discussion south, on said map of 1821, is very similar to the comparative location of Twenty Mile Creek on said topographical map relative to the course of Cheoah River on the topographical map. Further, the "creek" on the map of 1821, is shown as flowing from a point far in North Carolina and having a large drainage basin, which is true of no other stream except the Cheoah River, within miles of the disputed territory. Under the calls of the Cession Act, the commissioners' report and the Confirmatory Acts, the creek can be no other than the Cheoah River, which river and its junc-

tion with the Tennessee could not fail to have been seen by the commissioners, while on the line north of and approaching the Tennessee, as well as observing its tributaries heading on the undisputed line immediately south of the junction. That this "creek" represents the Cheoah River is testified to and their reasons given by Hale (Rec., p. 1175) and Williams (Rec., pp. 976, 977).

The United States Circuit Court at Knoxville, upon the bill of review proceedings of the case Belding v. Hebard, in its opinion rendered by Hon. John E. McCall, found and held that the said "creek" was, in the court's judgment, intended to represent the Cheoah River.

The State of North Carolina claims this "creek" to be Slick Rock Creek, and further claims that it is wrongly sketched in on the map through an error; in that said "creek" should have been sketched in as a part of the boundary line for five miles from its mouth. It is apparent, under this contention, a necessary corollary is that the report of the commissioners and the Confirmatory Acts also need interlineations made to their descriptions of the line to have them in accordance with the "error" claim on the map of 1821. We submit, to sketch a creek in roughly when located near to *but not part of a line* would not be unexpected, but to sketch a creek running away from a line when it is urged that it was intended to adopt the "creek" for five miles as part of that line, and that this was done by formally appointed commissioners of two sovereign States authorized to run the boundary line between said States, to prevent future disputes, and to further claim the commissioners neglected to include any reference thereto in their formal report made to the two sovereign States appointing them, is beyond all credence.

Burns' Maps.

Both in this case of North Carolina v. Tennessee and the bill of review proceedings, Hopkins, et al., v. Hebard, et al., witness Burns was the chief witness, as to all maps and surveys endeavoring to show the State Line following down the Tennessee River, from the undisputed fore and aft tree on the north bank of the Tennessee, thence crossing the river to Slick Rock Creek and up said creek five miles, thence to Big Fodder Stack Peak, thence to the "Junction," the undisputed point on the south.

Briefly stated, all of Burns' deductions have little regard for the map of 1821 or the report of the commissioners and the legislative acts describing the line by setting forth controlling natural monuments declared by them as locating said boundary line—except as he urges they should be corrected or suffer interlineation. He endeavors to show that the surveys of the line as contended for by the State of North Carolina are very similar in form and distances to the platted lines (giving no attention to whether the line is shown on the commissioners' map as on mountains or following streams) on the map of 1821. Burns claims that the result of his surveys as to courses and distances are surprisingly close to those of the platted line laid down on the map of 1821, and yet it is admitted that the short lines laid down on the map of 1821 cannot be followed on the ground by taking off the angles and distances on the map of 1821 on account of the smallness of its scale (Rec., pp. 323, 324). He also admits that the lines platted on the map are too long as tangents or straight lines, to show a true survey of the mountain tops, where it is undisputed that the line is located (Rec., pp. 319, 320). He states that the small straight lines platted on the map of 1821 were in his judgment, points sighted to and bearings taken and then the measurements were made between said points

following the irregular course of the mountain ridges and admits that such being the fact, the line would be actually longer on the ground than indicated by the short lines on the map of 1821 (Rec., pp. 319, 320). Burns admits that he had not made any allowance for the variation of the compass since 1821 in his comparison (Rec., p. 321). Burns admits that he made no allowance for the fact that the "due south" line called for in the commissioners' report as the course of the line which runs from Unaka Mountain to the Georgia line on the map of 1821 is seven or eight degrees off from the North and South line (Rec., pp. 1421, 1422), as shown by the compass or needle marked on the upper part of the map of 1821 (Rec., pp. 322, 323).

As to the further evidence of the small value of such comparison of surveys, we call to the court's attention a survey made by one McClelland or McLelland, made about 1893, from the Unaka Turnpike to the Tennessee River. Said McClelland placed stone monuments at the end of each mile showing the distance from the Unaka Turnpike, which is reported at 101 miles south of the Cataloochee Turnpike Road, and also the distance on that basis, of the stone from the Cataloochee Turnpike. Big Fodder Stack Peak is shown by Hale to be between stones as placed by McLelland, showing 69 and 68 miles from the Cataloochee Turnpike (see map., Rec., opp. p. 1144 and Rec., p. 1148), which approximately placed Big Fodder Stack Peak at 68½ miles from Cataloochee Turnpike, while Burns' survey placed Big Fodder Stack as approximately 72 miles from Cataloochee Turnpike. This illustrates the exactness of surveys where a surveyor has opportunity to choose what irregular courses on the top of a mountain he will follow or cut across with a straight line.

Burns' expert map making cannot cover the fact that the line run by him is not in ac-

cordance with the map of 1821, in that he follows down the Tennessee River's north bank *one-half a mile* and follows up a stream five miles to get on a ridge which is contrary to said map and the report of the commissioners. The commissioners, for some reason, refrained from filing or referring to any courses and bearings of lines where they followed the mountains from the beginning of the Unicoy or Unaka Turnpike, and that reason appears to have been because they adopted the extreme heights of the mountains called for by the Cession Act, as they were directed to do by the legislative acts authorizing their appointment and as they set forth in their report they had done. They undoubtedly recognized that such calls, and representations on the map in accordance therewith, would be a more correct description of the line they adopted than would courses and distances.

Considerable stress is laid by witnesses offered on behalf of North Carolina on the fact that the report of the commissioners called for the line crossing Tennessee River at 65 miles, and they urge that if the line crosses the river direct from the undisputed fore and aft hemlock tree, as is contended for by the State of Tennessee, it would only be about 64½ miles to the south bank of the river. This fact is not material, even if it were granted to be true, for the reason that it will be noted that in the report of the commissioners all calls for the line striking or crossing natural monuments and trails from the beginning to the Hiawassee River, make said calls as full miles, that is, no fraction of a mile is called for, to wit, Porter's Gap at 22 miles; Equonettly Path at 53 miles, crossing Tennessee River at 65 miles, striking an old trading path leading from the valley towns to the overhill towns at 93 miles, striking Unicoy Turnpike at 101 miles. The only call for a fraction of a mile is in regard to

the location of the Meigs boundary post, which is called for at 31½ miles. (Rec., p. 83.)

Witnesses for North Carolina further claim and urge as in favor of its contention that a mile mark which they claim is a 65-mile circle is shown on the map of 1821 as being on the south bank of the Tennessee River. The sophistry of this contention is apparent when it is noted that the width of the Tennessee River, as sketched on the map of 1821, where the line crosses the same, exaggerates the actual width of the river several times, it being admitted that the actual width of the Tennessee River where it is concerned in the present dispute is 300 feet (Rec., p. 260), while on the map of 1821 it is shown as about half a mile (Rec., p. 260). Hence, if the river as sketched in on the map of 1821 represented its actual width, the first mile circle on said line south of the Tennessee River now claimed to be shown on the south bank of the said river, would be nearly half a mile south of the said south bank instead of on it.

Official Maps and Grants of Respective States Pertinent to the Disputed Territory.

The lands in Tennessee which lie adjacent to the disputed portions of the boundary line, lie within what is known as the Ocoee Land District. About 1836 a map of said district was made by the official surveyor of said district, which map shows the territory sectionized only up to Slick Rock Creek. Said map does not in any manner refer to said Slick Rock Creek as being the boundary line between the States of North Carolina and Tennessee. (Rec., p. 88.)

Just the reverse is true as to the map of the Ocoee Land District where is refers to the disputed territory as the head of the Tellico River, to wit, the said map shows the land sectionized to the line claimed as the

true State Line by Tennessee and denied by North Carolina, and also shows written near to said line, but east of it, the words "North Carolina." (Rec., pp. 1158-1159.) The lack of any such notation at Slick Rock Creek is pertinent evidence that such was not the fact at Slick Rock Creek, and was not the reason why the sectionizing was stopped at that place. In reference to the Ocoee map, which shows the territory sectionized only up to Slick Rock Creek, it is evident that the State of Tennessee did not recognize that the sectionizing of the Ocoee District by its surveyor represented all the territory in said District of Tennessee, for in 1854 the Legislature of Tennessee passed an Act, which provided:

> That all or any of the vacant lands in the Ocoee District may be entered by a general entry in the entry taker's office in said Ocoee District at Cleveland, whether the same *be designated on the map of said district or not.* Chap. 28, Acts of Tennessee, 1854.

The maps of the Ocoee District were in evidence in the case of Belding v. Hebard, 103 Fed. Rep. 532.

In 1837 the then surveyor of North Carolina made a map of the "Cherokee Country" within North Carolina, which shows the boundary line between the States of North Carolina and Tennessee south of the Tennessee River to the Georgia line as the western boundary line of said map. The map was made, therefore, within sixteen years after the survey of 1821 and did purport to show the State Line which is in dispute in this case. A duly certified copy thereof was filed in the evidence of this case by the Attorney-General of Tennessee. The map was made under the authority of the State of North Carolina (Acts of North Carolina, 1836 and 1837, Chap. 9, p. 30, Secs. 4 and 5), which Act directs

the lands lately acquired by her from the Cherokee Indians to be surveyed and directs three correct maps to be made, which maps were to show the boundary lines, water courses, etc., and directs one of said maps to be filed with the Secretary of State, who certifies to the copy in evidence in this case.

It will be noted said map shows the State Line located on mountains immediately south of the Tennessee River, and said line continues to be located on mountains south of any point disputed in this case. Said map shows said boundary line follows the course of no stream whatever. The map also shows that opposite to where the State Line leaves the south bank of the Tennessee River there is a similarly indicated line shown coming to the north bank of the river. The map also indicates by its markings that all the waters east of the State Line drain into the Cheoah Basin immediately south of the Tennessee River and for miles south of said river. From the State Line to the Cheoah River no stream is shown flowing into the Tennessee River.

The State Line as shown on this map of 1837 conforms throughout to the line claimed by the State of Tennessee.

This map of North Carolina of 1837 was *not* in evidence in the case of Belding v. Hebard, nor the case of *Stevenson v. Fain*, frequently referred to in this brief.

The oldest grants in evidence issued by the State of North Carolina for land in the disputed portion of Slick Rock territory were of the year 1853. It will be noted that as stated above, that in the year 1854 the State of Tennessee enacted a law authorizing entries to be made and grants to be issued for lands in the Ocoee District, whether designated or not, on the map of the Ocoee District. (Acts of Tennessee, 1854, Chap.

28) Apparently from the map of the Ocoee District (Rec., p. 88) this Act pertained to the territory in dispute as the lands "not designated" on said map of the Ocoee District. At least the Act recognized that there were such lands in the Ocoee District. The oldest grant in evidence issued by the State of Tennessee for lands in the disputed portion of Slick Rock Basin was in 1886. (Rec., p. 1233.) In the disputed territory at the head of Tellico River just the reverse is the fact, i. e., the Tennessee grants are the older and the North Carolina grants of a much later date, or younger. There is no evidence that any of the said State grantees of either State lived in the disputed territory, that is, they were not homesteaders.

Published Maps of North Carolina and Tennessee.

Witnesses may be prejudiced or antagonistic, but maps printed by reputable publishers through a period of nearly a century, cannot be regarded as representing the boundaries of a State on a map of the State other than because they are believed to be correct.

S. S. Gannett, a witness offered by the State of North Carolina, testified that previous to his examination he had examined the maps of North Carolina and Tennessee in the map department of the Congressional Library, and further stated that all of said maps show the State Line as contended for by the State of North Carolina at the places in dispute. Mr. Gannett admits that he had his memorandum of his map examination with him at the time he testified that *all said maps showed the State Line following up Slick Rock Creek.* (Rec., pp. 448, 449.) These statements Mr. Gannett at some time after endeavored to modify. (Rec., pp. 449, 450, 451.)

The State of Tennessee took the deposition of Mr. O. Welti of the map department of the Congressional Library as to the maps on file in said depart-

ment, which show the boundary line between North Carolina and Tennessee. (Rec., p. 917.) The following forty-nine maps were produced: Carey, 1818; Carey & Lea, 1822; Lucas, 1823; Tanner, 1823; Tanner, 1825; Tanner, 1830; Hinton, 1831; Mitchell, 1832; Tanner, 1833; Brazier, 1833; Burr, 1835 (Manuscript map); Tanner, 1836; Tanner, 1839; Burr, 1839; Hinton, 1842; Mitchell, 1843; Meyer, 1845; Tanner, 1845; Copperwaith, 1854; Cooke, 1857; Colton, 1860; Colton, 1861; Lloyd, 1862; Lloyd, 1863; Nicholson, 1863 (U. S. Coast Survey map); Nicholson & Foote, 1864 (U. S. Coast Survey map); Nicholson & Lindenkohl, 1865 (U. S. Coast Survey map); Johnson, 1865 (U. S. Coast and Geodetic Survey map); Merrill, 1865; Schonberg, 1866; Colton, 1866; Colton, 1867; Pearce, 1871; Pearce, 1872; Williams, 1873; Gray, 1874; Kilebrew, 1879; Gray, 1881; Cobb, 1881; Kerr, 1882; Kerr, 1883; Colton, 1883; United States Coast Survey, 1884; Shaffer, 1885; Hord, 1888; Colton, 1890; Matthews-Northrup, 1895; Rand, McNally & Co., 1898; and map of the Cherokee Indian country filed with executive document 182 to the Fifty-third Congress. (Rec., pp. 917-925.)

Mr. Welti was examined as to whether said maps showed the boundary line between North Carolina and Tennessee immediately south of the Tennessee River as located on mountains or following a stream. (Rec., pp. 918-935.) *Of the forty-nine maps only one, the Brazier map of 1833,* shows the State Line following a creek, from the Tennessee River. (Rec., p. 919.)

Forty-seven of said maps show the boundary line between the States southwestwardly from the Tennessee River located on an unbroken ridge of mountains (Rec., p. 919), all of which maps, therefore, confirm the line as claimed by the State of Tennessee. One map, a manuscript map (Burr, 1835), merely shows an outline of the boundary and represents no natural monuments thereon.

It will be noticed that in said list of maps are five United States topographical maps which show the line in accordance with Tennessee's contention. One of said maps, Cooke, 1857, bears the title:

> "Cooke's New Map of the State of North Carolina, constructed from actual surveys, private contributions and authentic public documents procured for the purpose under a special resolution of the General Assembly of the State. William D. Cooke."

This map is one of the forty-seven maps conforming to Tennessee's contention, and as do many of the other maps, shows the Cheoah River flowing from the Tennessee River next or near to where the State Line crosses the river, and shows said Cheoah River similarly as the "creek" is shown at the same place on the map of 1821. Also note that this is true on the United States Coast and Geodetic Survey map between pages 1570 and 1571 in the record, i. e., the Cheoah River is shown running from the foot of the mountains, on which the State Line is located, where the Tennessee River crosses the line and represents the course of the Cheoah River as shown thereon, similarly to the course of the "creek" sketched on the map of 1821, following into the Tennessee River on said map of 1821 just east of where the line crosses the same, which confirms the contention of Tennessee that said "creek" on the map of 1821 represents the Cheoah River.

"Davenport Field Notes."

It is not contended that these notes are copies of field notes adopted by the commissioners of 1821, and for that reason they are not relevant nor valuable. No reference whatever is made as to field notes by the commissioners in their report, nor do they refer to any on the map of 1821. The Confirmatory Acts of

the States ratifying the commissioners' report say not a word as to any field notes.

It is a fundamental principle of the law of evidence, needing no quotation of authorities, that for a copy of a document to be admissible, the fact of the original having existed and having been lost or destroyed must first be established. That any field notes were ever adopted or approved by the commissioners of 1821 has not been established. It is not even contended that these field notes are original field notes of anyone, but admitted not to be, and from what original they were copied has not been shown. It is not proven, therefore, what the contents of the original were or that the copy is substantially an accurate copy of any notes or that the copy contains substantially all that the original contained. Why field notes were not filed with the report of the commissioners of 1821, as were filed by the commissioners of 1799, as a part of their report, is a query, but there is no doubt that they did not and they carefully excluded any reference to field notes and limit their calls to natural monuments only.

From any angle or viewpoint, the "Davenport Notes," so called, are of no value to the determination of this litigation. If the "Davenport Notes," so called, were proper evidence as documents and call for a line down the Tennessee River and up Slick Rock Creek, the map of 1821 and the report of the commissioners clearly demonstrate that the commissioners did not adopt any such surveyed line. It would merely, at most, be a confirmation of that which has always been admitted as probable, to wit, that the commissioners of 1821, or some members of their party, ran a tentative survey up Slick Rock Creek, which they abandoned in adopting the line over Hangover Mountain, as was stated by Judge Lurton in his opinion in the case of Belding v. Hebard (103 Fed. Rep. 532), in the following words:

". . . . the stronger probability is that it was tentatively marked, and then abandoned for the Hangover line as the one indicated by the Cession Act, and the report made accordingly." (Rec., p. 1397.)

In Conclusion.

We cannot do better, in an endeavor to suggest to the court what part of the voluminous evidence in this case is the essential and controlling evidence, and the comparative weight of different portions of the same, than state some further reasons, additional to those previously quoted herein, of the master, the Circuit Court and the Circuit Court of Appeals in the case of Belding v. Hebard, which are within the record of this case. The master's report and the opinions rendered by both courts show the painstaking, conscientious care of able and unprejudiced judicial minds. Such of the evidence in this case now before the court, which was not in the record of that case, will be, we believe, determined as of value and important or not of value and unimportant by the same test of reasons that controlled the decisions of the master and the courts in Belding v. Hebard.

From the master's report we further quote:

"They mention the fact that they reach the Tennessee River, that they cross it and that they leave it, and I do not believe that they would have run down the river for one-half a mile and made no mention of that fact, nor do I believe that they would have run for five miles up Slick Rock Creek, a creek with numerous tributaries, apparently of considerable size, so large in fact, that there is another creek in the same basin called Little Slick Rock, and not have mentioned it in their report. After this call has reached Unaka Mountain they are particular to call attention to every object that could give permanency and notoriety to the location and when the Hiwassee

River, which at that point is running the same course as the line they were running and they go up the river about one mile, they call attention to the fact (the river was then running in their direction), and if necessary to call attention to the fact when the river was in direct course, how much more necessary it would have been when by following it the line is deflected and caused to turn back at an acute angle. In running up Hiwassee River they passed the mouth of Cane Creek and they mention this fact, and yet, shall we say they run up Slick Rock Creek for five miles and made no mention of that. As soon as Hiwassee River, by a bend, leaves the general course of the line being run, they leave the river. They were not running with rivers, they were locating a line that was to be run along the tops of mountains. But again, the line runs 'from the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.' How shall it get to the main ridge, by running down the river and up Slick Rock Creek to a spur of Fodder Stack and thence to its junction, the Hangover? I am satisfied from the proof that the Hangover is the main ridge, and that to get on the main ridge, they would have had to be on the Hangover either before or after its junction with the Fodder Stack, and according to the proof, when they came to the river on the northeast side and looked across, there directly opposite them was a continuation of the same ridge along the height of which they were running. This main ridge was on the southwest side of the river higher than it was on the northeast side and run in the general course of the line they were running. They were locating a line which was to run along the extreme height of the mountains from the Great Iron or Smoky Mountain to the Unaka and at the time the line strikes the Tennessee River they say they are on the extreme height of this mountain and immediately across the river is the same mountain, some higher, but the same, and I think that unquestion-

ably this is the main ridge on which they say they run and indicated the line. (Rec., pp. 341, 342.)

"There are other reasons disclosed by the record of greater or less weight to the same effect.

"There are more marked trees on the Slick Rock Creek line than on the Hangover, but I am inclined to believe from the record that it would not be safe to attempt to pull this line away from the well defined natural objects to follow marks as shown on either line. This section of country was inhabited by the Indian tribes until 1836 or 1837, and is crossed by numerous trails and paths, and numerous marks are found similar to these State Line marks. . . . There are many ways in which these marks could have been placed there without having been made by these State commissioners, but if made by them it was evidently run as a tentative line and not adopted or reported by them, and if they are to mark the line actually run and adopted, why did they mark so carefully for a mile and a half and then not mark any trees for three or three and a half miles? There was an abundance of timber all the way, that they might have marked."

Judge Clark, in the opinion of the Circuit Court, said:

"As I concur with the commissioner in the reasons which he gives, as well as the conclusions at which he arrives, it is not necessary that I should go over the ground separately. It results therefore that the exceptions to the commissioners' report are overruled, the report confirmed and decree will go accordingly." (Rec., p. 370.)

And from the decision of the Circuit Court of Appeals rendered by Judge Lurton we add the following excerpts:

"The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line *there* crossed the river. The general course of the line,

as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the Cession Act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover Ridge. . . .

". . . The master reports that the Hangover Ridge was the main or highest ridge, having an average height of eight hundred feet greater than the Fodder Stack. . . .

". . . We have two established points in the line as actually run by the State commissioners of 1821, between which points the disputed line exists. One point is the fore and aft tree on the northeastern side of the Tennessee River, and the other is some eight miles southwest from that tree, being the well marked line on the height of Hangover, where a junction is made with the Fodder Stack Ridge. If we reverse the survey and take this junction of the two ridges, or leads, as they are sometimes called, as a starting point in running backwards, one can not doubt but that the line should follow Hangover to the river. The Fodder Stack Ridge would not be observed by surveyors who had reached that point while following the highest ridge from Unicoy or Unaka, for it branches off several hundred feet below the crest of the Hangover, and the fact that a spur was there could only be learned by going down the mountain from three to four hundred feet. To abandon the Hangover in running backwards would also involve a change in direction from northeast to north, and then northwest and then west, and the Tennessee River would not be reached at all but by again diverging and following one or other of two lateral spurs. . . .

". . . The Hangover is undoubtedly the 'main ridge' called for in the survey made by the commissioners, and definitely locates the line, un-

less there appears such definite and positive evidence of another and different actual location of the line as to justify us in finding that the line as described and located by natural monuments is not in fact the line actually run and marked and adopted by the commissioners. Every presumption is that the commissioners obeyed the directions of the Cession Act, and so also every presumption is that the line as actually run, marked and adopted, was a line which conforms to the call to follow the extreme height of the 'main ridge' from the Tennessee River to Unaka.

". . . Appellants rely upon the fact that between the mouth of Slick Rock and the junction of Hangover and Fodder Stack Ridges they show forty-one trees marked as State Line trees, and from this circumstance they contend that this was a line actually marked by the commissioners and adopted by them as the line and that the calls for course and the 'main ridge' must yield to the actually marked line. . . .

". . . The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and one-half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then, where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after starting up the spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover, only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the commission.

"For what purpose, is the question. Their evidential value as establishing the actual State

Line is greatly impaired by the following circumstances:

"1. The line thus marked is not upon the course which is called for by the survey as reported and adopted.

"2. It departs from the line of the 'main ridge' called for in the commissioners' survey, and a natural monument of the utmost significance. When a monument, natural or artificial, is called for and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground.

"But in this instance there was no reasonable doubt as to the identity of the 'main ridge' called for in the commissioners' survey.

"The greater altitude of the Hangover Ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover and not the Fodder Stack was the 'main ridge.'

"It is, therefore, not a case of ambiguous calls or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the Cession Act, and was indicated by the chops on the established monument on the north side of the river, leave no reason for supposing that the commission mistook the Fodder Stack Ridge as the 'main ridge,' and undertook to reach it by a line up the creek.

"3. If we adopt the Slick Rock Creek line, we must believe that the commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile, and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line.

"4. We must also believe that instead of following a mountain boundary, which according to the Cession Act, ran with the summits of the highest mountains, they deliberately abandoned the

heights of the mountain ranges and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever.

"5. The significance of these trees as marking the State Line is also affected by the fact that other trees similarly marked are found on the Fodder Stack Ridge, which, confessedly, are not upon any line now claimed as the actually located State Line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey, in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the Hangover line, as the one indicated by the Cession Act, and the report made accordingly.

"6. But the significance of the marked trees on the Slick Rock Creek line is also weakened greatly by the fact that two, and possibly three, old marked State Line trees are found on the Hangover line. One of these trees is a black or red oak, and the other a sourwood. These trees stand on the summit of the Hangover Ridge. The question as to whether they bore the proper marks for State Line trees, marked in 1821, was much controverted. The master, after seeing and hearing most of the witnesses and weighing the evidence and seeing the blocks cut from the oak, reached the conclusion that the marks were State Line marks made in 1821, and so reported. . . .

". . . We have then two lines run and marked. One is the better marked, possibly because it passed through more timber and timber better adapted to carry the marks than the other which followed a rocky, barren, mountain ridge, where the trees, as shown by the evidence, were scrubby and scarce. The other line, though more scantily marked, is found just where the course and natural monuments called for in the report of

> the survey would locate the line if neither had been marked. That the line ought to run on the extreme height of the Hangover Ridge from the Tennessee River to the Unaka Mountain, if the calls of the confirmatory boundary acts of both States are to control, is most evident.''(Rec., pp. 405-410.)

In the above case the original report of the commissioners of 1821 was not in evidence, but the Confirmatory Acts of the respective States, ratifying said report, were in evidence *and the description of the line contained therein is identical with the description in the original report of the commissioners.*

Therefore, as the master and courts found and held that the Confirmatory Acts by their description of the line, necessarily located the line over Hangover, their reasons apply with the same force to the line as described in the original commissioners' report in evidence in this case. The same reasons also control as to the map of 1821, which shows the line conforming to the description of the Confirmatory Acts of the respective States and the report of the commissioners. Neither the map of 1821 nor the report of the commissioners nor the Confirmatory Acts of the respective States, nor the Cession Act, call for a line following down the Tennessee River northwesterly one-half mile, crossing said river, thence up the meanders of a creek five miles, etc., but all do comply with the line contended for by the State of Tennessee, to wit, crossing the Tennessee River direct where it strikes the same thence located on an unbroken ridge of mountains southwesterly to a point far south of any now in dispute.

The marked trees in evidence in the case of Belding v. Hebard are substantially as in the evidence in this case. The peculiar clusters or groups in which

the marked trees occur on Slick Rock Creek remains as a fact in this case. The reasons given by the master and the courts why said marked trees on Slick Rock Creek cannot prevail to remove the true line from the heights of the Hangover Mountain down into the gorge of a creek are just as strong and sound under the evidence in this case, as they were in that case.

JOHN FRANKLIN SHIELDS,
WILLIAM A. STONE,
Counsel for the Babcock Lumber and Land Company, as Amicus Curiae.